Supreme Court, U.S.
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No. 04-

In the Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

ABU-ALI ABDUR'RAHMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals' holding — that only those Rule 60(b) motions in habeas corpus cases whose predicate facts present a direct challenge to the prisoner's conviction or sentence are second or successive habeas petitions under 28 U.S.C. § 2244(b) — violates the restrictions on successive habeas litigation adopted by Congress in that statute and is in conflict with decisions of this Court and other circuit courts.

II. Whether this Court's decision in *O'Sullivan v. Boerckel* authorizes a habeas petitioner to obtain relief under Rule 60(b)(6), Fed.R.Civ.P., from a procedural default judgment, on the theory that the state supreme court later adopted a rule that made an application for a discretionary appeal to that court retroactively "unavailable" and thus unnecessary for exhaustion of state remedies.

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT OF INTERESTED PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES, RULES, AND ORDERS INVOLVED . . 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING REVIEW 8

I. This Case Involves The Same Issue As That Raised By *Gonzalez v. Crosby*, Now Under Review By This Court 8

II. By Holding That Abdur'Rahman Presented Proper Grounds For Relief Under Rule 60(b)(6), The Sixth Circuit Decided This Case In A Way That Conflicts With This Court's Decision In *O'Sullivan v. Boerckel* 10

CONCLUSION 18

APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Abdur'Rahman v. Bell,
226 F.3d. 696 (6th Cir. 2000) 5

Abdur'Rahman v. Bell, 534 U.S. 970 (2001) 5

Abdur'Rahman v. Bell, 535 U.S. 1016 (2002) 6

Abdur'Rahman v. Bell, 537 U.S. 88 (2002) 6

Abdur'Rahman v. State, No. M1988-00026-SC-DPE-PD
(Tenn. March 6, 2003) 6

Adams v. Holland, 330 F.3d 398 (6th Cir. 2003),
cert. denied, 124 S.Ct. 1654 (2004) 12, 15

Calderon v. Thompson, 523 U.S. 538 (1998) 9

Gonzalez v. Crosby, *cert. granted*,
No. 04-6432 (Jan. 14, 2005) 8

Gonzalez v. Sec'y for Dep't of Corr., 366 F.3d 1253
(11th Cir. 2004) (en banc). 9

Jones v. State, No. 01C01-9402-CR-00079,
1995 WL 75427 (Tenn.Crim.App. Feb. 23, 1995) . 4

Jones v. Tennessee, 498 U.S. 908 (1990) 4

Jones v. Tennessee, 516 U.S. 1122 (1996) 4

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) . . . . . *passim*

Randolph v. Kemna, 276 F.3d 401 (8th Cir. 2002) 16

Rodwell v. Pepe, 324 F.3d 66 (1st Cir.), *cert. denied*, 540 U.S. 873 (2003) 8

Silverberg v. Evitts, 993 F.2d 124 (6th Cir. 1993) 10

Smith v. Anderson, __ F.3d __, Nos. 05-3241/3243 (6th Cir. March 6, 2005) 9

State v. Evans, 108 S.W.3d 231 (Tenn. 2003) 14

State v. Jones, 789 S.W.2d 545 (1990) 4

State v. Sandon, 777 P.2d 220 (Ariz. 1989) 12

Wenger v. Frank, 266 F.3d 218 (3d Cir. 2001) 15

Statutes and Rules

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1631 5
28 U.S.C. § 1655 3
28 U.S.C. § 2244(b) 1, 5, 7, 8, 9
28 U.S.C. § 2254(c) 1, 2, 11, 16, 17

Fed.R.Civ. 60(b) . . . . . *passim*
Fed.R.Civ. 60(b)(6) . . . . . *passim*

Ark.Sup.Ct.R. 1-2(h) 12
Mo.Sup.Ct.R. 83.04 12
Tenn R.App.P. 3 11
Tenn R.App.P. 11 . . . . . *passim*

Tenn.Sup.Ct.R. 28 14
Tenn.Sup.Ct.R. 39 . . . . . *passim*

Other Authorities

Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 1999-2000 14

Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2000-01 14

Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2001-02 14

Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2002-03 14

Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2003-04 14

In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000) (per curiam) 12

In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 471 S.E.2d 454 (1990) 12

PETITION FOR A WRIT OF CERTIORARI

The Attorney General and Reporter of the State of Tennessee, on behalf of Ricky Bell, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App. 1a) is reported at 392 F.3d 174. The order of the en banc court of appeals granting rehearing (App. 40a) is reported at 332 F.3d 960. The panel order of the court of appeals (App. 42a) is unreported. The order of the district court denying, dismissing, and transferring a motion for relief from judgment (App. 48a) is unreported. The memorandum opinion of the district court denying habeas relief (App. 62a) is reported at 999 F.Supp. 1073.

STATEMENT OF JURISDICTION

The judgment and opinion of the en banc court of appeals (App. 1a) was entered on December 13, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES, AND ORDERS INVOLVED

28 U.S.C. § 2244(b) provides:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas

corpus application under section 2254 that was not presented in a prior application shall be dismissed unless–

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Fed.R.Civ.P. 60(b) provides:

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective

> application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

The June 28, 2001, order of the Tennessee Supreme Court establishing Tennessee Supreme Court Rule 39 is reprinted in the appendix to this petition. (App. 60a)

STATEMENT OF THE CASE

In 1987, Abu-Ali Abdur'Rahman, then known as James Lee Jones, was convicted of first degree murder, assault with intent to commit first degree murder, and armed robbery. The jury sentenced him to death for the murder after finding three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while the defendant was engaged in committing, or

was attempting to commit, any first degree murder or robbery.[1] The Tennessee Supreme Court affirmed, *State v. Jones*, 789 S.W.2d 545 (1990), and this Court denied certiorari. *Jones v. Tennessee*, 498 U.S. 908 (1990).

In 1991, Abdur'Rahman filed a petition for state post-conviction relief. The trial court denied the petition after an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed in all respects. *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn.Crim.App. Feb. 23, 1995). He then filed an application for further appellate review with the Tennessee Supreme Court under Tenn.R.App.P. 11. However, that application did not present all the claims that Abdur'Rahman had previously presented to the intermediate appellate court. (App. 71a, 75a-76a) The Tennessee Supreme Court denied review on August 28, 1995, *see id.*, and this Court denied certiorari. *Jones v. Tennessee*, 516 U.S. 1122 (1996).

Abdur'Rahman filed in the district court a petition for federal habeas corpus relief on April 23, 1996, and an amended petition on December 2, 1996, challenging his convictions and sentences. The district court issued an order granting the writ and vacating the death sentence on Abdur'Rahman's claim of ineffective assistance of counsel at the sentencing phase. (App. 62a) The district court denied relief on all other claims. Several of these claims were determined to be procedurally defaulted due to Abdur'Rahman's failure to exhaust by presenting them to the State's highest court, as well as his inability to establish cause and prejudice for the default or a fundamental miscarriage of

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[1] The trial court sentenced petitioner to two consecutive life terms for the two remaining convictions.

justice. (App. 77a, 89a) Both Abdur'Rahman and the State appealed from the final judgment. However, Abdur'Rahman did not appeal any of the district court's procedural default rulings.

The court of appeals reversed the judgment granting the writ as to Abdur'Rahman's death sentence but affirmed the judgment in all other respects. *Abdur'Rahman v. Bell*, 226 F.3d. 696 (6th Cir. 2000). Rehearing was denied, and, on October 9, 2001, this Court denied certiorari. *Abdur'Rahman v. Bell*, 534 U.S. 970 (2001).

On November 2, 2001, Abdur'Rahman filed a motion in the district court under Fed.R.Civ.P. 60(b)(6), seeking relief from the district court's 1998 judgment denying habeas relief. The motion relied on Tenn.Sup.Ct.R. 39, promulgated by the Tennessee Supreme Court on June 28, 2001, which provided that, from and after July 1, 1967, a litigant "shall not be required" to present a claim of error to the Tennessee Supreme Court in order to exhaust state remedies for federal habeas corpus purposes. (App. 61a) The motion sought reconsideration of fourteen individual claims of prosecutorial misconduct, ten of which had been denied as procedurally defaulted.[2] The district court, concluding that the Rule 60(b) motion constituted a second or successive petition subject to 28 U.S.C. § 2244(b), transferred the matter to the Sixth Circuit pursuant to 28 U.S.C. § 1631. A panel of the Sixth Circuit denied Abdur'Rahman's application to appeal the district court's order and rejected what it construed as an application for leave to file a second or successive petition. *In re Abdur'Rahman*, No. 01-6487 (6th Cir. Feb. 11, 2002)

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[2] The district court had considered the substantive merits of the remaining four claims and denied relief on that basis.

(order denying application to file successive petition); *Abdur'Rahman v. Bell*, No. 01-6504 (Jan. 18, 2002) (order denying certificate of appealability). This Court granted certiorari, *Abdur'Rahman v. Bell*, 535 U.S. 1016 (2002), but on December 10, 2002, after briefing and argument, the Court dismissed the writ as improvidently granted, *Abdur'Rahman v. Bell*, 537 U.S. 88 (2002), due, apparently, to a jurisdictional issue. *See id.*, 537 U.S. at 89 (Stevens, J, dissenting).

Abdur'Rahman responded to this dismissal by filing an identical Rule 60(b) motion in the district court on December 12, 2002. The district court again construed the motion as a successive habeas petition and transferred it to the Sixth Circuit on December 17, 2002. (App. 48a) Abdur'Rahman appealed from this order and applied to the district court for a certificate of appealability, which the court denied on December 19, 2002. (App. 55a) Abdur'Rahman thereafter applied to the Sixth Circuit for a certificate of appealability and moved to retransfer his so-construed second or successive petition back to the district court, insisting that it was a Rule 60(b) motion. On March 5, 2003, a divided panel of the Sixth Circuit denied both motions. (App. 42a-43a) On March 6, 2003, the Tennessee Supreme Court reset the date for execution of Abdur'Rahman's sentence to June 18, 2003. *Abdur'Rahman v. State*, No. M1988-00026-SC-DPE-PD (Tenn. March 6, 2003).

On June 6, 2003, however, rehearing was granted by the en banc Sixth Circuit, and the court issued a stay of Abdur'Rahman's execution. (App. 40a-41a) Briefing in the en banc court was completed on November 3, 2003, and the case was argued on December 3, 2003. On December 13, 2004, the court issued its opinion; in a 7-6 split decision, which overruled its own precedent, the court established a

new test for determining when a purported Rule 60(b) motion ought to be construed as a second or successive habeas petition. (App. 2a) Under that test, only "when the motion's factual predicate deals primarily with the constitutionality of the underlying state . . . conviction or sentence" should the motion be treated as a second or successive habeas petition. (App. 11a) Applying that test to Abdur'Rahman's case, the court held that his motion was not a second or successive petition. (App. 13a) It further held that Abdur'Rahman's motion presented proper grounds for relief from judgment under Fed.R.Civ.P. 60(b)(6). (App. 20a) Accordingly, the court reversed the judgment of the district court and remanded for the district court to consider "whether the motion should be granted, based on the potential merit of Abdur'Rahman's prosecutorial misconduct claims previously found to have been procedurally defaulted." (App. 24a)

The dissent concluded, however, that, because Abdur'Rahman's claims had already been once adjudicated and ruled to be procedurally defaulted, a Rule 60(b) motion seeking to relitigate that adjudication was "second or successive" and thus barred by 28 U.S.C. § 2244(b). "To hold otherwise would be effectively to eviscerate AEDPA." (App. 25a) The dissent observed that it was not the court's province to judge Congress' prohibition against rehashing claims and that it could not rewrite the statute to provide for a second adjudication of claims "when the statute clearly says otherwise." (App. 27a) The dissent further concluded that, even if Abdur'Rahman's motion were not prohibited by AEDPA, it nevertheless would fail to present proper grounds under Rule 60(b). If, as the majority concluded, Tenn.Sup.Ct.R. 39 merely "clarified" the law regarding exhaustion, then the motion must be regarded as one alleging a "mistake" under 60(b)(1), which would be untimely due to that rule's one-year limitations period. If, on the other hand,

Rule 39 changed the law, this circumstance would not be sufficiently "extraordinary" so as to warrant relief under 60(b)(6). (App. 31a-32a) Moreover, "the change in the law raises grave questions as to whether retroactive application of the rule is appropriate in this case." (App. 32a) "Whether Rule 39 'clarified' Tennessee law or 'changed' it, there can be little doubt that it effectively overruled *O'Sullivan v. Boerckel*." (App. 32a)

REASONS FOR GRANTING REVIEW

I. THIS CASE INVOLVES THE SAME ISSUE AS THAT RAISED BY *GONZALEZ V. CROSBY*, NOW UNDER REVIEW BY THIS COURT.

This case involves precisely the same issue as that raised by *Gonzalez v. Crosby*, *cert. granted*, No. 04-6432 (Jan. 14, 2005): whether or to what extent a habeas petitioner may utilize Rule 60(b), Fed.R.Civ.P., in a habeas corpus proceeding in light of the restrictions on successive habeas litigation set forth in 28 U.S.C. § 2244(b). As recognized by the lower court here, a significant split exists among the circuits on this issue. (App. 7a, 24a) *See also Rodwell v. Pepe*, 324 F.3d 66, 67, 69-70 (1st Cir.), *cert. denied*, 540 U.S. 873 (2003) (citing cases) ("There are three principal schools of thought [among the circuits] on this controversial subject."). Indeed, the decision of the Sixth Circuit here conflicts with that of the Eleventh Circuit in *Gonzalez*. The Sixth Circuit held that only those post-judgment motions whose predicates deal primarily with the constitutionality of the underlying state court conviction or sentence should be treated as successive habeas petitions. (App. 3a, 11a). In *Gonzalez*, on the other hand, the Eleventh Circuit held that a Rule 60(b) motion to reopen a habeas judgment should be regarded as a second or successive habeas petition, except

where the judgment is reopened to correct a clerical error or where there is fraud upon the federal court that led to the denial of the original habeas petition. *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1278 (11th Cir. 2004) (en banc). *See Smith v. Anderson*, __ F.3d __, Nos. 05-3241/3243, slip op., p. 7 n.4 (6th Cir. March 6, 2005) ("The ruling at issue in *Gonzalez* conflicts with the law of this Circuit, as stated in *Abdur'Rahman*.").

Furthermore, the lower court's decision here conflicts with this Court's decision in *Calderon v. Thompson*, 523 U.S. 538 (1998), in which the Court observed that a motion to reopen a habeas judgment "on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b)." 523 U.S. at 553. "Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, or the bar against litigation of claims not presented in a prior application." *Id.* (citations omitted). Indeed, it was the Eleventh Circuit's reliance on *Calderon* that led to its holding in *Gonzalez*. *See Gonzalez*, 366 F.3d at 1277; *see also id.*, 366 F.3d at 1275 ("The Supreme Court in *Calderon* indicated that only two exceptions apply to the rule that the final judgment in a habeas case may not be reopened . . . unless the demanding standard that applies is met.").[3] And if this Court should follow the principle expressed in *Calderon* and affirm the judgment in *Gonzalez*, then Abdur'Rahman's case was wrongly decided by the Sixth Circuit. Accordingly, the petition in this case should be held pending this Court's decision in *Gonzalez*. Assuming the Court affirms in *Gonzalez*, or otherwise decides that case in a manner inconsistent with the Sixth Circuit's holding here,

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[3] In contrast, the majority opinion of the Sixth Circuit here does not mention this Court's decision in *Calderon* at all.

the petition should then be granted, the lower court judgment vacated, and the case remanded to the Sixth Circuit for further consideration in light of *Gonzalez*.

II. BY HOLDING THAT ABDUR'RAHMAN PRESENTED PROPER GROUNDS FOR RELIEF UNDER RULE 60(b)(6), THE SIXTH CIRCUIT DECIDED THIS CASE IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISION IN *O'SULLIVAN V. BOERCKEL*.

Even if this Court decides *Gonzalez* in a manner consistent with the lower court's holding here, this case furnishes another reason for granting review. Applying to Abdur'Rahman's motion the court's newly adopted test for determining whether it should be treated as a successive habeas petition, the Sixth Circuit held not only that the motion was not a successive petition, but also that, under Rule 60(b)(6), it presented proper grounds for relief from the district court's procedural default judgment. In deciding the case in this way, the lower court acted contrary to this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

In 1998, when the district court rendered a final adjudication on Abdur'Rahman's habeas petition, it ruled that his prosecutorial misconduct claims were procedurally defaulted due to his failure to exhaust them in state court by presenting them for discretionary review to the Tennessee Supreme Court. (App. 71a, 74a-79a) The district court relied at the time on existing Sixth Circuit precedent for the proposition that a habeas petitioner must seek discretionary review from the state's highest court in order to exhaust, *see Silverberg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993), a proposition with which this Court expressly agreed in *Boerckel*, decided one year after the district court's ruling.

Boerckel established the rule that, in order to exhaust state remedies, state prisoners are required "to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State." 526 U.S. at 847. The case involved Illinois' two-tiered appellate review procedure, the second tier of which is initiated by a petition for discretionary review to the Illinois Supreme Court. *Id.*, 526 U.S. at 843. Applying the exhaustion provisions of 28 U.S.C. § 2254(c), and concluding that comity dictates that a state prisoner use the state's "established appellate review procedure" before he presents his claims to a federal court, this Court determined that "[a] petition for discretionary review in Illinois' Supreme Court is a normal, simple, and established part of the State's appellate review process" and was, thus, an "available" remedy under the statute. *Id.*, 526 U.S. at 845. *See id.* ("In the words of [§ 2254(c)], state prisoners have 'the right . . . to raise' their claims through a petition for discretionary review in the State's highest court."). Because a habeas petitioner who does not seek such available review has not properly presented his claims to the state court, the Court held, he has procedurally defaulted them for purposes of federal habeas review. *Id.*, 526 U.S. at 848.

In 1995, when Abdur'Rahman challenged his convictions and sentence on post-conviction appeal in the state courts, Tennessee's established appellate review process was virtually identical to the two-tier Illinois procedure at issue in *Boerckel*. *See* Tenn.R.App.P. 3, 11 (1995). Indeed, the lower court's dissenting opinion here observes that "all agree [that the Illinois procedure] mirrors the Tennessee Supreme Court's discretionary review procedure in all material respects." (App. 33a) But in 2001, in response to *Boerckel*,[4] the

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[4] *See* Tenn.R.App.P. 11, 2002 Adv. Comm'n Cmt.

Tennessee Supreme Court promulgated Supreme Court Rule 39, which states that a litigant "shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error." (App. 61a)[5] Abdur'Rahman filed his purported Rule 60(b) motion in 2002, seeking relief from the district court's procedural default ruling on the basis of Tenn.Sup.Ct.R. 39.

The Sixth Circuit held that, in so basing his motion on Rule 39, Abdur'Rahman presented proper grounds for relief under Rule 60(b)(6). Citing its own precedent, *see Adams v. Holland*, 330 F.3d 398 (6th Cir. 2003), *cert. denied*, 124 S.Ct. 1654 (2004), the court determined that Rule 39 meant what it purports to say: that discretionary review of a claim need not be sought from the Tennessee Supreme Court in order to exhaust that claim for purposes of federal habeas review. (App. 15a-16a) Moreover, the court afforded the rule retrospective application when it determined that, though Rule 39 was promulgated in 2001 and Abdur'Rahman's state appeal concluded in 1995, "pursuant to [Tenn.Sup.Ct.R. 39], Abdur'Rahman was *never* required to raise his claims before

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[5] In addition to the Tennessee Supreme Court, courts in at least five other states have adopted similar rules. *See State v. Sandon*, 777 P.2d 220, 221 (Ariz. 1989) (Arizona); Ark. Sup. Ct. R. 1-2(h) (Arkansas); Mo.Sup.Ct.R. 83.04 (as amended July 1, 2002) (Missouri); *In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000) (per curiam) (Pennsylvania); *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 321 S.C. 563, 564, 471 S.E.2d 454 (1990) (South Carolina).

the Tennessee Supreme Court for exhaustion purposes." (App. 23a) (emphasis added). "[R]elief pursuant to Rule 60(b)(6) is permissible," the court said, because Rule 39 thus caused the basis for the district court's procedural default ruling to "crumble[]." (App. 20a, 23a) This aspect of the lower court's decision conflicts with this Court's decision in *Boerckel* in two significant respects.

First, though this Court observed in *Boerckel* that "nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that the remedy is unavailable," 526 U.S. at 847, the lower court majority was wrong to conclude that the Tennessee Supreme Court, in adopting Rule 39, had "adopt[ed] . . . a rule specifically endorsed by the majority opinion in [*Boerckel*]." (App. 18a, n.1) Rule 39 *does not* render discretionary review "unavailable;" indeed, after adopting Rule 39, the Tennessee Supreme Court left Rule 11 — which provides for an application for permission to appeal and the standards governing the grant of such review — unchanged. *See* Tenn.R.App.P. 11, 2002 Adv.Comm'n Cmt. (Rule 39 "works *no change* to T.R.A.P. 11 itself.") (emphasis added). Discretionary review instead remains "an established part of [Tennessee's] appellate review process," *Boerckel,* 526 U.S. at 845; *cf. id.*, 526 U.S. at 850 (Souter, J., concurring) (suggesting that majority left open possibility that a prisoner may skip a procedure that State has identified "as outside the standard review process"),[6] and the Tennessee Supreme Court

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[6] Recent studies demonstrate that approximately 7% to 10% of applications for permission to appeal are granted by the Tennessee Supreme Court. *See Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 1999-2000,* at 9 (2000) (reporting 83 applications granted, 714 denied (10.4% granted)); *Annual Report of the Tennessee Judiciary, Statewide*

continues to recognize "the *right* to seek second-tier review pursuant to [Rule 11]." *State v. Evans*, 108 S.W.3d 231, 234 (Tenn. 2003) (emphasis added) (clarifying procedure for delayed Rule 11 appeals on direct review).[7]

Second and moreover, even if the promulgation of Rule 39 were sufficient to render discretionary review "unavailable" so as to make it unnecessary, as of June 28, 2001, for a prisoner to seek such review in order to exhaust, the lower court's decision would still conflict with *Boerckel* by virtue of its conclusion that Rule 39 also works to erase Abdur'Rahman's procedural default by relieving him of his obligation to have sought discretionary review in 1995.

Appellate and State Trial Court Statistics, FY 2000-01, at 39 (2001) (reporting 69 applications granted, 878 denied (7.3% granted)); *Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2001-02*, at 41 (2002) (reporting 63 applications granted, 772 denied (7.5% granted)); *Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2002-03*, at 33 (2003) (reporting 76 applications granted, 825 denied (8.4% granted)); *Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2003-04*, at 37 (2004) (reporting 58 applications granted, 832 denied (6.5% granted)). Thus, discretionary review by the Tennessee Supreme Court appears to be more "available" than the discretionary review before the Illinois Supreme Court when *Boerckel* was decided, *see* Br. of Resp't, at *6 n.2, *O'Sullivan v. Boerckel*, No. 97-2048 (U.S. filed Jan. 28, 1999), available at 1999 WL 61669 (indicating that the Illinois Supreme Court grants review in approximately 3% of cases).

[7] *See also* Tenn.Sup.Ct.R. 28, §§ 9(D)(1)(b), (2)(b) (permitting delayed appeal to supreme court when "petitioner was deprived of the right to request an appeal pursuant to Rule 11").

Indeed, affording the rule such retrospective application allows it to effectively *overrule* the decision in *Boerckel,* as the dissent below observed. (App. 32a)[8] It is a matter of objective historical fact that discretionary review *was* available in 1995. Indeed, the Sixth Circuit has itself observed that "federal courts interpreting Tennessee law have, until the passage of Rule 39, always required appeal to the Tennessee Supreme Court as part of the habeas exhaustion requirement." *Adams*, 330 F.3d at 405. And although Rule 39, both by its terms and as interpreted by the Sixth Circuit, purports to apply retrospectively, it simply cannot alter this historical fact. *See Wenger v. Frank*, 266 F.3d 218, 226 (3d Cir. 2001) (noting that, while state may prospectively change remedies available under state law, "if remedy was available or unavailable at some time in the past, it is difficult to see how that fact can be retroactively altered"). *See also Boerckel*, 526 U.S. at 862 (Stevens, J., dissenting) ("[D]iscretionary review was either 'available' to a prisoner when he was in the state system or it was not.").

The lower court majority determined that Rule 39 "clarified" state law.[9] (App. 19a) But *what* state law? As noted above, Rule 39 works *no* change to Tennessee's rule regarding discretionary review, Tenn.R.App.P. 11. And though the Tennessee Supreme Court's order establishing

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[8] The dissent further observed that, if states can promulgate rules to retroactively change the "available" remedy inquiry, there is no reason that Illinois could not also pass such a rule and thus effectively *reverse Boerckel.* (App. 33a)

[9] Though the majority regarded the Rule has having "clarified" state law, it proceeded nevertheless to apply the analysis under Fed.R.Civ.P. 60(b)(6) for granting relief from judgment for a *change* in the law. (App. 20a)

Rule 39 features the word "clarify," it purports to "clarify" only that "the denial of relief by the Court of Criminal Appeals *shall* constitute exhaustion." (App. 60a) (emphasis added). Nowhere in the order, or in the Rule itself, does the court say that this had *always* been the rule, or that no litigant had *ever* been required to petition for discretionary review in order to exhaust. *Cf., Randolph v. Kemna*, 276 F.3d 401, 404-405 (8th Cir. 2002) (Missouri Supreme Court order noting that transfer to that court is unnecessary for federal habeas purposes expressly recites that it did so "[i]n order to state the existing law in Missouri.").[10] Moreover, while a state court is free to determine what is or is not an available state remedy, *see Boerckel*, 526 U.S. at 847-848, what "shall [or shall not] constitute exhaustion" is a question of federal — not state — law. *See Boerckel,* 526 U.S. at 862 (Stevens, J., dissenting) (state courts should not be allowed "to construe for themselves the federal-law exhaustion requirement in § 2254"). It would be one thing to say, therefore, that Rule 39 stands as a sufficiently plain declaration of the wishes of the state's highest court so as to render discretionary review "unavailable" for exhaustion purposes *in the future*; but it would be quite another thing to say, as the lower court has done here, that the Rule also works, *post hoc*, to remove the availability of discretionary review *from the past,* and thereby undermine federal court rulings regarding exhaustion. As the dissent below observed, "[F]ederal law is not that fragile." (App. 33a)

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[10] The Tennessee rule stops short of saying this because it simply could not be said. Indeed, if it had always been the case that it was unnecessary to petition for discretionary review to exhaust, there would have been no need for the rule to include the language purporting to give it retroactive effect: "In all appeals from criminal convictions or post-conviction review matters from July 1, 1967, ..." (App. 61a)

The rule established in *Boerckel* is a rule of comity, which dictates that state prisoners "give the state courts one full opportunity to resolve any constitutional issue by invoking one complete round of the State's established appellate review process." 526 U.S. at 845. The Court did recognize, of course, that this rule had the potential of increasing the number of filings in state court — filings that the state court may not wish to have the opportunity to review. *Id.*, 526 U.S. at 847. And, indeed, the Tennessee Supreme Court indicates that it adopted Rule 39 to deter litigants' "routinely petition[ing the c]ourt for permission to appeal . . . in order to exhaust . . . for purposes of federal habeas corpus litigation." (App. 60a) But this interest is promoted only by *prospective* application of Rule 39; *retrospective* application of the rule, on the other hand, obviously serves no such interest — those filing decisions have long since been made.

This Court observed in *Boerckel* that the ultimate question is whether a habeas petitioner "has 'the right *under the law of the State to raise, by any available procedure,* the question presented.'" 526 U.S. at 847 (quoting 28 U.S.C. § 2254(c)) (emphasis in original). Abdur'Rahman not only had that right in 1995, he availed himself of it — he simply failed to present all of his claims. (App. 74a-79a) And *Boerckel* instructs that this failure results in the procedural default of these claims. 526 U.S. at 848. Petitioner submits that the Sixth Circuit's decision, which undermines this extant procedural default by affording Rule 39 retroactive application, conflicts with *Boerckel*, and that this Court should therefore grant certiorari to address this question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 02-6547/6548

[Filed December 13, 2004]

In re Abu-Ali Abdur'Rahman, Movant.	)
	)
Abu-Ali Abdur'Rahman, Petitioner-Appellant,	)
	)
v.	)
	)
Ricky Bell, Warden, Respondent-Appellee.	)

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 96-00380
Todd J. Campbell, District Judge

Before: BOGGS, Chief Judge; MARTIN, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, Circuit Judges.

OPINION

R. GUY COLE, JR., Circuit Judge. Petitioner Abu-Ali Abdur'Rahman appeals the district court's denial of his motion for relief from that court's earlier judgment denying his petition for a writ of habeas corpus. *Abdur'Rahman v. Bell*, 999 F. Supp. 1073 (M.D. Tenn. 1998). The district court held that petitioner's motion for relief from judgment, which he filed pursuant to Rule 60(b), amounted to an impermissible second or successive habeas petition as defined by 28 U.S.C. § 2244(b)(1).

This case requires us to determine whether and under what circumstances a prisoner may use Rule 60(b) of the Federal Rules of Civil Procedure to seek relief from a judgment dismissing a habeas petition. At issue, in particular, is whether and to what extent the availability of Rule 60(b) is restricted by the limits imposed on the filing of second or successive habeas petitions by the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub.L. No. 104-132 §§ 101-107, 110 Stat. 1214, 1217-26 (codified as amended in 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (2000)). Some courts have held that any motion labeled as one pursuant to Rule 60(b) remains fully viable in the habeas context and unaffected by the strictures of AEDPA. Others including the dissent in this case would treat any motion based on one or more of the grounds enumerated in Rule 60(b) as a second or successive habeas petition, even if the motion contained no constitutional claim at all.

Today, we eschew both of those extremes and align ourselves with those courts that use a functional approach to determine when a district court may entertain a Rule 60(b) motion filed by a prisoner who seeks to vacate a district court's judgment denying him habeas relief. Although a

petitioner should not be permitted to use Rule 60(b) to avoid AEDPA's limitations on second or successive habeas petitions, the solution to that problem is not to bar Rule 60(b) motions in the habeas context altogether. Instead, we hold that a Rule 60(b) motion should be treated as a second or successive habeas petition only if the factual predicate in support of the motion constitutes a direct challenge to the constitutionality of the underlying conviction. In cases which the factual predicate in support of the motion attacks the manner in which the earlier habeas judgment was procured and is based on one or more of the grounds enumerated in Rule 60(b), the motion should be adjudicated pursuant to Rule 60(b). *See Rodwell v. Pepe*, 324 F.3d 66, 67 (1st Cir. 2003).

Because Abdur'Rahman's motion does not constitute a direct challenge to the constitutionality of his conviction, the motion is not the functional equivalent of a second or successive habeas petition. Rather, Abdur'Rahman's motion challenges the procedural basis on which the district court's judgment denying his habeas petition rested and, therefore, should be adjudicated pursuant to Rule 60(b). For that reason, we **REVERSE** the district court's order of dismissal and **REMAND** petitioner's motion to the district court for consideration as a motion brought pursuant to Rule 60(b).

I.

The history of this case is long and circuitous. *See Abdur'Rahman v. Bell*, 537 U.S. 88, 123 S. Ct. 594, 154 L. Ed. 2d 501, 2002 Day 13901 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); *Abdur'Rahman v. Bell*, No. 3:96-0380 (M.D. Tenn., Dec. 17, 2002). Therefore, we set forth only the procedural background relevant to resolving the issues before us.

In 1988, on direct appeal, the Tennessee Supreme Court affirmed Abdur'Rahman's conviction and death sentence for first-degree murder. His attempts to obtain post-conviction relief in the state court system were similarly unsuccessful. In 1996, he filed an application for a writ of habeas corpus in the federal district court and advanced several constitutional claims, two of which raised troubling questions. The first claim challenged the competency of petitioner's trial counsel; the second contained serious allegations of prosecutorial misconduct.

After hearing evidence on both claims, on April 8, 1998, the district court entered an order addressing each claim. First, the district court granted relief as to the ineffective assistance of counsel claim. Having found trial counsel ineffective, the district court granted habeas relief as to petitioner's sentence and vacated the death sentence, although the court denied relief as to petitioner's murder conviction. On appeal, however, a divided panel of this Court reinstated the death sentence, finding that although Abdur'Rahman's counsel's performance was deficient, Abdur'Rahman had not been prejudiced. *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), *cert. denied*, 534 U.S. 970, 122 S. Ct. 386, 151 L. Ed. 2d 294 (2001).

Second, the district court held that the prosecutorial misconduct claims were procedurally barred because Abdur'Rahman failed to seek discretionary review of those claims in the Tennessee Supreme Court and the time for doing so had expired. *Abdur'Rahman*, 999 F. Supp. at 1080-83. However, on June 28, 2001, while the appeal from the district court's denial of Abdur'Rahman's habeas petition was pending and in response to the United States Supreme Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) the Tennessee Supreme Court

promulgated a rule clarifying that criminal defendants were not required to appeal to the Tennessee Supreme Court in order to be deemed to have exhausted all available state remedies concerning claims of error for federal habeas corpus purposes. *See* Tennessee Supreme Court Rule 39 ("TSCR 39"). TSCR 39 states in relevant part:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to ... file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

As the Tennessee Supreme Court stated, TSCR 39 was designed to "clarify that denial of relief by the [Tennessee] Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes." *See* In re: Order Establishing Rule 39, Rules of the Supreme Court of Tennessee: Exhaustion of Remedies.

TSCR 39 made it clear that the district court's refusal to consider Abdur'Rahman's prosecutorial misconduct claims on the merits rested on faulty ground because Abdur'Rahman was never required to seek discretionary review of his prosecutorial misconduct claims in the Tennessee Supreme Court, as the district court believed he was. Petitioner alerted the district court to this error on November 2, 2001, when he filed a motion pursuant to Rule 60(b) of the Federal Rules of

Civil Procedure seeking relief from the district court's judgment of April 8, 1998, which dismissed his prosecutorial misconduct claims as procedurally barred. Petitioner's motion did not assert any new constitutional claims and did not rely on any newly discovered evidence. It merely asked the district court to vacate its order on the ground that its procedural bar ruling was based on the erroneous assumption that Abdur'Rahman was required to appeal his prosecutorial misconduct claims to the Tennessee Supreme Court.

Relying on *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996), which declared that "[w]e agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition," the district court characterized petitioner's motion as a second or successive habeas corpus application, governed by 28 U.S.C. § 2244. On that basis, the district court denied the motion, dismissed it for lack of jurisdiction, and transferred the case to the Court of Appeals pursuant to 28 U.S.C. § 1631. A divided panel of this Court denied petitioner relief, stating that "the district court properly found that a Rule 60(b) motion is the equivalent of a second or successive habeas corpus petition," and then held that Abdur'Rahman's petition did not satisfy the gateway criteria set forth in 28 U.S.C. § 2244(b)(2) for the filing of such a petition. *Abdur'Rahman v. Bell*, Nos. 98-6568/6569, 01-6504 (6th Cir., Jan. 18, 2002). This Court subsequently granted petitioner's request for rehearing *en banc*.

II.

We turn to the question before us: Is a motion for relief pursuant to Rule 60(b) equivalent to a second or successive habeas petition pursuant to AEDPA? After addressing that question we will apply the answer to Abdur'Rahman's case.

The courts of appeals that have heretofore grappled with this question have provided divergent answers. The Second Circuit seems to be the only court of appeals to have ruled categorically that a motion pursuant to Rule 60(b), brought after a district court's ruling on an initial habeas petition, is not a second or successive habeas petition, and that such motions should always be treated as any other motion pursuant to Rule 60(b). *Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001).

At the other end of the spectrum, several courts of appeals, as well as the dissent in our case, have concluded that a Rule 60(b) motion in a habeas case must – always or almost always – be treated as a second or successive habeas petition pursuant to AEDPA. *See, e.g., Gonzalez v. Sec'y for Dep't of Corrs.*, 366 F.3d 1253 (11th Cir. 2004) (en banc) (holding that Rule 60(b) motions must always be treated as second or successive habeas petitions except where the final judgment is recalled or reopened to correct clerical errors in the judgment itself or where there was fraud upon the federal court which led to the denial of the habeas petition); *Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998) (holding that the successive petition restrictions contained in 28 U.S.C. § 2244(b) apply to Rule 60(b) motions). A panel of this Circuit has trumpeted that view as well. *McQueen*, 99 F.3d at 1335 ("We agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition ...."). According to the Eleventh Circuit, which is the leading proponent of this view, permitting Rule 60(b) to operate as it customarily does would allow prisoners to circumvent AEDPA's restrictions on second and successive habeas petitions in federal courts. *Gonzalez*, 366 F.3d at 1256 ("One of the most popular vehicles used in the attempted end-runs [around AEDPA] is

a Fed. R. Civ. P. 60(b) motion requesting that the prior judgment denying relief be set aside.").

But neither of the categorical approaches just described is satisfactory. The wholly unrestricted approach taken by the *Rodriguez* court fails to appreciate the potential for some Rule 60(b) motions to subvert AEDPA's objectives. But the rigid approach, adopted by the Eleventh Circuit and the dissent here, prohibits too much. It fails to appreciate both the significant functional differences between Rule 60(b) motions and habeas petitions and that those differences mean that many Rule 60(b) motions will not run afoul of AEDPA.

Rule 60(b) motions and habeas petitions serve different purposes. Contrary to the dissent's assertion, Rule 60(b) does not permit parties to relitigate the merits of claims, or to raise new claims that could have been raised during the litigation of the case or in the initial habeas petition. Rather, the purpose of a Rule 60(b) motion is to allow a district court to reconsider its judgment when that judgment rests on a defective foundation. The "factual predicate [of a Rule 60(b) motion] deals with some irregularity or procedural defect in the procurement of the judgment denying habeas relief." *Rodwell*, 324 F.3d at 70.

A second or successive habeas petition "is a different species." *Gonzalez*, 366 F.3d at 1292 (Tjoflat, J., concurring in part and dissenting in part). Like an initial habeas petition, a second or successive habeas petition seeks to invalidate the state court's judgment of conviction based on a constitutional error. Pursuant to AEDPA, a "second or successive" habeas petition is meant to address two specific types of constitutional claims by prisoners: (1) claims based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" and that was "previously

unavailable;" and (2) claims that rely on a rule of constitutional law and that are based on evidence that "could not have been discovered previously through the exercise of due diligence" and that would establish the petitioner's factual innocence. 28 U.S.C. § 2244(b)(2). In this way, second or successive habeas petitions are based entirely on "the alleged violations of federal rights" that occur during the criminal trial. *Rodriguez*, 252 F.3d at 199; *see also Abdur'Rahman*, 537 U.S. at 95-96 ("[L]ike all habeas corpus petitions, [a second or successive habeas petition] is meant to remedy constitutional violations ... while a Rule 60(b) motion is designed to cure procedural violations in an earlier proceeding – here, a habeas corpus proceeding that raise questions about the proceeding's integrity.") (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted).

The dissent would hold that, with the exception of the ground of fraud provided in Rule 60(b)(3), AEDPA precludes the district courts of this Circuit from entertaining Rule 60(b) motions filed by prisoners seeking to vacate a district court's judgment denying them habeas corpus relief. To obtain relief on any of the remaining grounds – Rule 60(b)(1), (2), (4), (5), or (6) – the petitioner would have to fashion his claim as a second or successive habeas petition pursuant to 28 U.S.C. § 2244(b)(2), and must apply to this Court pursuant to 28 U.S.C. § 2244(b)(3) for leave to file it. In other words, the dissent would treat any motion based on one or more of the grounds enumerated in Rule 60(b) as a habeas petition, even if the motion contained no constitutional claim at all. But that approach plainly ignores the significant functional difference between Rule 60(b) motions and habeas petitions, discussed above.

Moreover, the dissent offers no reason for permitting Rule 60(b)(3) motions based on fraud while prohibiting motions brought pursuant to the other provisions enumerated in Rule 60(b). This is puzzling, because fraud is not the only reason to doubt the integrity of a habeas judgment. Rule 60(b)(1), for instance, states that a federal judgment may be reconsidered and vacated if it was based on "mistake, inadvertence, surprise, or excusable neglect." As the Second Circuit noted, the integrity of a habeas judgment might be called into doubt pursuant to Rule 60(b)(1) where the respondent engaged in unfair surprise by failing to notify the petitioner of the witnesses it planned to call in the habeas hearing. *Rodriguez*, 252 F.3d at 199. The dissent in our case offers no reason why fraud on the court would be a valid basis for a Rule 60(b)(3) motion, while such a claim of unfair surprise, filed as a Rule 60(b)(1) motion, would have to be characterized as a second or successive habeas petition. "In each situation, the motion challenges only the etiology of the habeas judgment itself," not the constitutionality of the underlying conviction. *Rodwell*, 324 F.3d at 70. Accordingly, it makes sense to treat both motions pursuant to Rule 60(b).

There is another crucial distinction between Rule 60(b) motions and habeas petitions. Granting a second or successive habeas petition invalidates a prisoner's conviction and/or sentence. Granting a Rule 60(b) motion has no such effect. It merely reinstates the previously-dismissed habeas petition, opening the way for further proceedings. *Abdur'Rahman*, 537 U.S. at 94 ("[T]he difference [between a second or successive habeas petition and a Rule 60(b) motion] is defined by the relief that the applicant seeks.") (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted). Although a Rule 60(b) motion is "undoubtedly a step on the road to the ultimate objective of invalidating the judgment of conviction," the motion itself does not seek that relief.

Rodriguez, 252 F.3d at 198. As the Second Circuit logically pointed out, "[t]he fact that the Rule 60(b) motion contemplates ultimately the vacating of the conviction is shared with every motion the petitioner might make in the course of pursuing his habeas motions to compel disclosure or quash the respondent's discovery demands, motions for extension of time to answer the adversary's motion, motions to be provided with legal assistance, motions for summary rejection of respondent's contentions," and even motions for relief from judgment grounded in fraud, which the dissent here would recognize. *Id.* at 198-99. But this fact does nothing to convert the motion into a second or successive habeas petition.

Having distinguished between motions pursuant to Rule 60(b) and second or successive habeas petitions, we are mindful that prisoners might attempt to subvert AEDPA by dressing second or successive habeas petitions in Rule 60(b) garb. The solution to this problem, however, is to adopt a conceptual framework that curtails the potential for abuse while permitting Rule 60(b) motions in appropriate circumstances. To that end, we adopt the First Circuit's approach to this issue:

> The inquiry must proceed case by case. The [district] court must examine the factual predicate set forth in support of a particular motion. When the motion's factual predicate deals primarily with the constitutionality of the underlying state [or federal] conviction or sentence, then the motion should be treated as a second or successive habeas petition. This situation should be distinguished from one in which the motion's factual predicate deals primarily with some irregularity or procedural defect in the procurement of the judgment denying habeas relief.

> That is the classic function of a Rule 60(b) motion, and such a motion should be treated within the usual confines of Rule 60(b).

Rodwell, 324 F.3d at 70 (internal citation omitted).

This approach is functional in nature. Whether a motion will be treated as one pursuant to Rule 60(b) or as a second or successive habeas petition will depend not on the label affixed to the motion, but on its substance. *Id.* at 71. It is only when a petitioner presents a direct challenge to the constitutionality of the underlying conviction that the petition should be treated as a second or successive habeas petition. But if there is no such direct challenge and the petitioner instead challenges the integrity of the district court opinion for one of the reasons provided in Rule 60(b), then the district court must treat the motion as one pursuant to Rule 60(b). *Compare Hamilton v. Newland*, 374 F.3d 822, 824 (9th Cir. 2004) (holding that habeas petitioner's motion for reconsideration of denial of habeas relief must be treated as motion pursuant to Rule 60(b) where petitioner sought to have district court reconsider its prior ruling that his habeas claims were barred by the one-year limitations period under AEDPA), *with Rodwell*, 324 F.3d at 71-72 (holding that petitioner's motion for relief from judgment denying federal habeas relief, brought pursuant to Rule 60(b), was a second or successive habeas petition, and thus was required to be dismissed, because it asked the district court for an opportunity to offer facts – namely, that one of the key witnesses against petitioner was an undercover government agent – that would prove that his state-court conviction for murder was constitutionally infirm), *and Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc) (treating a Rule 60(b) motion that raised a new claim that the state failed to disclose exculpatory evidence as a successive habeas petition). This ruling applies with equal

force to motions brought in the 28 U.S.C. § 2255 context since AEDPA incorporates by reference in § 2255 the same "second or successive" rules imparted in § 2254.

Although, as the First Circuit noted, "this test [would not] operate with mathematical precision," it would preserve the independent goals of both Rule 60(b) and AEDPA, and we should be "confident that ... the district [court would] be able to sift wheat from chaff without undue difficulty." *Rodwell*, 324 F.3d at 71.

The holding in *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996), that endorsed the rigid approach we have just rejected is hereby overruled.

III.

We now consider Abdur'Rahman's motion, which asks the district court to vacate its judgment denying his habeas petition on the ground that he was never required to raise his prosecutorial misconduct claims before the Tennessee Supreme Court for exhaustion purposes. That motion does not present a direct challenge to the constitutionality of his state court conviction. Instead, it relates to the integrity of the federal habeas judgment – and specifically, the basis for the district judge's procedural default ruling. If Abdur'Rahman's motion were granted, it would simply result in the reopening of the federal habeas proceeding, not the vacation of the state criminal judgment. Accordingly, the motion should be treated as one pursuant to Rule 60(b), not as a second or successive habeas petition.

The dissent erroneously argues that Abdur'Rahman's motion is a second or successive habeas petition because his prosecutorial misconduct claims – by virtue of being deemed

procedurally defaulted – were adjudicated "on the merits. " But that argument privileges the form of the judicial disposition over the substance of the motion, and once again ignores the key functional differences between Rule 60(b) motions and second or successive habeas petitions. That procedural default rulings are typically considered rulings "on the merits" does not change the fact that Abdur'Rahman's motion does not directly seek relitigation of claims already adjudicated. Rather, Abdur'Rahman challenges the procedural basis on which the district court's judgment concerning his prosecutorial misconduct claim rested. *See Hamilton*, 374 F.3d at 824 (holding that habeas petitioner's motion for reconsideration of denial of habeas relief must be treated as motion pursuant to Rule 60(b) where petitioner sought to have district court reconsider its prior ruling that his habeas claims were barred by the one-year limitations period under AEDPA).

Rule 60(b) authorizes the district courts to relieve a party to a civil action from the force of a final judgment on the following grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence [the party] could not have ... discovered in time to move for a new trial under Rule 59(b); (3) fraud ... misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment.

Abdur'Rahman has characterized his motion as one pursuant to Rule 60(b)(6), which permits relief from judgment for "any other reason justifying relief from the operation of judgment." This provision has been called a "reservoir of equitable power" to do justice in a particular case. *Compton v. Alton S.S. Co., Inc.*, 608 F.2d 96, 106 (4th Cir. 1979). For that reason, there is concern for abuse of a Rule 60(b)(6) motion in habeas proceedings – perhaps more concern than there is with other Rule 60(b) motions whose nature is more easily ascertained. But Rule 60(b)(6) has been narrowly interpreted and courts have stressed that such motions should only be raised in exceptional or "extraordinary circumstances." *Liljeberg v. Health Svcs. Acquisition Corp.*, 486 U.S. 847, 863-64, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988); *Pierce v. United Mine Workers*, 770 F.2d 449, 451 (6th Cir. 1985). Furthermore, this provision and other provisions of Rule 60(b) are mutually exclusive that is, if the reason offered for relief from judgment could be considered under one of the more specific clauses of Rule 60(b)(1) -(5), then relief cannot be granted under Rule 60(b)(6). *Liljeberg*, 486 U.S. at 863 & n.11.

Here, the only other provision pursuant to which Abdur'Rahman's motion might conceivably be brought is Rule 60(b)(1)'s provision for relief from judgment when there has been a "mistake." But in this case, it simply stretches logic to say that the district court made a "mistake" when it held Abdur'Rahman's prosecutorial misconduct claim unexhausted based on his failure to appeal it to the Tennessee Supreme Court. Although TSCR 39 – which states that defendants do not have to appeal to the Tennessee Supreme Court in order for their claims to be considered exhausted for habeas purposes – is a clarification of pre-existing law, review by a state supreme court was, before TSCR 39's promulgation, an available state remedy that defendants

traditionally pursued because all available state remedies had to be exhausted prior to the claims being eligible for habeas review. *See Adams v. Holland*, 330 F.3d 398, 405 (6th Cir. 2003) (holding that a discretionary appeal to the Tennessee Supreme Court is not required for federal exhaustion purposes under TSCR 39).[1]

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[1] In *O'Sullivan*, the Supreme Court held that absent an express pronouncement by the State, a federal court must require a *habeas* petitioner to exhaust all state remedies, including discretionary review before the state supreme court, in order to satisfy federal *habeas* exhaustion requirements. *See O'Sullivan*, 526 U.S. at 847-48. Therefore *O'Sullivan* explicitly noted that a State could require something less than discretionary review before the highest state court for the purposes of federal exhaustion.

Contrary to the dissent's assertions, *Adams v. Holland* did not "effectively overrule [] *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999)." In *O'Sullivan*, the Supreme Court noted under 28 U.S.C. § 2254(c), a *habeas* petitioner must give state courts a "*fair* opportunity to act on their claims ... Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, that state courts should have the first opportunity to review this claim and provide any necessary relief." *O'Sullivan*, 526 U.S. at 844 (emphasis in original, interior citations removed). This was required even in Illinois, which has discretionary state supreme court review, and where Illinois Supreme Court Rule 315(a) arguably discouraged the filing of "petitions raising routine allegations of error." *Id.* at 846.

However, the Supreme Court noted that such a ruling may, in fact, result in a greater burden on the state supreme courts.

> We acknowledge that the rule we announce today - requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate

> review procedure in the State - has the *potential* to increase the number of filings in state supreme courts. We also recognize that this increased burden may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court. *See, e.g., In re Exhaustion of State Remedies in Criminal and Postconviction Relief Cases*, 321 S.C. 563, 471 S.E.2d 454 (1990); *see also State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (1989). Under those circumstances, Boerckel may be correct that the increased unwelcome burden on state supreme courts disserves the comity interests underlying the exhaustion doctrine. In this regard, we note that nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that the remedy is unavailable.

Id. at 847 (emphasis in original).

As noted in the above quotation, the *O'Sullivan* majority cited approvingly to South Carolina's statement regarding *habeas* exhaustion, *In re Exhaustion of State Remedies in Criminal and Postconviction Relief Cases*, 321 S.C. 563, 471 S.E.2d 454 (S.C. 1990). *See O'Sullivan*, 526 U.S. at 847, Justice Souter, writing separately, quoted the South Carolina rule:

> [I]n all appeals from the criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and certiorari following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies.

Indeed, prior to TSCR 39's promulgation, federal courts interpreting Tennessee law required appeal to the Tennessee Supreme Court as part of the habeas exhaustion requirement. *See, e.g., Jones v. Jones*, 76 F. Supp. 2d 850, 856-57 (E.D. Tenn. 1999); *Cole v. Campbell*, 703 F. Supp. 657, 659 (M.D. Tenn. 1988); *Layman v. Russell*, 300 F. Supp. 430, 431 (E.D. Tenn. 1969). These district courts – and the district court in this case – did not make a "mistake" in requiring defendants to appeal to the Tennessee Supreme Court, because they simply had no reason – based on United States Supreme Court law, state law, and federal court precedents – to know otherwise. Indeed, this presumption was later

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Id. at 849 (citing *In re Exhaustion of State Remedies in Criminal and Postconviction Relief Cases*, 321 S.C. 563, 471 S.E.2d 454 (S.C. 1990)). Justice Souter further noted "[The majority's citation of the South Carolina rule] should not be read to suggest something more: that however plainly a State court may speak, its highest court must be subjected to constant applications for a form of discretionary review that the State wishes to reserve for truly extraordinary cases, or else be forced to eliminate that kind of discretionary review." *Id.* at 849-50.

In response to *O'Sullivan*, the Tennessee Supreme Court promulgated TSCR 39, modeled after the South Carolina Rule, to clarify that a request for discretionary review was in fact, not required for the purposes of exhaustion. This is the essential holding of *Adams*, 330 F.3d at 403-04.

Given the Tennessee Supreme Court's adoption of a rule specifically endorsed by the majority opinion in *O'Sullivan* for a purpose specifically advocated by a concurring justice, it is surprising that the dissent believes *Adams* somehow overrules Supreme Court precedent.

ratified by the Supreme Court in *O'Sullivan*. *See O'Sullivan*, 526 U.S. at 847-48.[2] But TSCR 39 eventually clarified that such an appeal was not, in fact, required. As such, Abdur'Rahman's motion is properly characterized as a Rule 60(b)(6) motion. It does not relitigate the merits of his prosecutorial misconduct claim, but rather asks the district court to reconsider its judgment, which was based on a defective foundation: namely, an unclear state of the law, which was later clarified. This analysis does not chart new legal territory, as the dissent suggests. Federal courts have applied Rule 60(b)(6), as opposed to a Rule 60(b)(1) "legal mistake," where a state supreme court clarifies existing state law. *See, e.g., Heirs-At-Law & Beneficiaries of Gilbert v. Dresser Indus., Inc.*, 158 F.R.D. 89, 92 (N.D. Miss. 1993).

Rule 60(b)(6) has no specific time limitation within which it must be filed, save that it be brought within a "reasonable time." Fed. R. Civ. P. 60(b)(6). The reasonable time standard

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[2] For this reason, the dissent in not persuasive in stating that the district court made a "legal mistake" in ruling the petitioner failed to exhaust. Like the Supreme Court in *O'Sullivan*, the district court merely applied a *presumption* that a state supreme court wishes to be the first court to review a habeas petitioner's claims. *See O'Sullivan*, 526 U.S. 838 at 847, 144 L. Ed. 2d 1. Such a presumption, like all presumptions, does not necessarily determine whether the state court *actually* wishes to be the first court to review these claims. Accordingly, the district court cannot be viewed as making a "legal mistake" by correctly applying presumptions later endorsed by the Supreme Court - presumptions which may or may not accurately reflect the *actual* wishes of the state supreme court. Nor can the state supreme court be said to change its own law where it merely corrects a presumption of a federal court regarding state court procedures applicable to state court review.

has been interpreted to depend on the factual circumstances of each case. *Smith v. Sec'y of Health and Human Svcs.*, 776 F.2d 1330, 1333 (6th Cir. 1985). Here, Abdur'Rahman has satisfied the reasonable time requirement. TSCR 39 became effective on June 28, 2001 and Abdur'Rahman filed his Rule 60(b) motion approximately four months later, on November 2, 2001.

As noted above, Rule 60(b)(6) should be used only in "extraordinary circumstances." *Liljeberg*, 486 U.S. at 863-64. Although TSCR 39 is not accurately characterized as a change in law, but rather a clarification of the law, the "extraordinary circumstances" analysis here is most analogous to that which would be used if we were confronting a change in law, and so we apply that analysis here. A change in decisional law is usually not, by itself, an extraordinary circumstance. *Agostini v. Felton*, 521 U.S. 203, 239, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997); *Blue Diamond Coal Co. v. Trs. of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001). There must be a change in decisional law "coupled with some other special circumstance" to grant relief under Rule 60(b)(6). *Id.* at 524.

In this case, relief pursuant to Rule 60(b)(6) is permissible for two reasons. First, TSCR 39 does not constitute a clarification in *decisional* law such that *Agostini* even applies or such that an "extraordinary circumstance" is even required. The decisional law in this case is comprised of the precedent governing claims of prosecutorial misconduct. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). If the district court had reached the merits of Abdur'Rahman's claims and determined that no prosecutorial misconduct took place, but then the Supreme Court altered *Brady* such that the district court's holding was wrong, there would be no grounds for relief pursuant to Rule

60(b)(6). But TSCR 39 does not similarly alter decisional law; it clarified the law underlying the district court's decision not even to reach the merits of Abdur'Rahman's constitutional claim. *Cf. In re Pacific Far East Lines, Inc.*, 889 F.2d 242, 250 (9th Cir. 1989) (granting relief pursuant to Rule 60(b)(6) when Congress passed a statute, which capped referee fees in bankruptcy proceedings, shortly after the parties reached a settlement to pay fees that were four times the cap; court rejected the argument that unexpected changes in statutory law are similar to situations in which a party decides not to appeal but then gets a "second bite at the apple" by free-riding off of a change in decisional law resulting from an unrelated party's successful appeal, which then alters the case law).

Second, even if TSCR 39 were considered a clarification of decisional law, there is an "extraordinary circumstance" here, stemming from the nature of Abdur'Rahman's "default." As is well-established (although sometimes muddled by courts), two types of procedural barriers might preclude federal review of claims in a habeas petition. The first type, procedural default, is a judicially created rule, grounded in fealty to comity values and requiring federal courts to respect state court judgments that are based on an "independent and adequate" state procedural ground. *Coleman v. Thompson*, 501 U.S. 722, 732, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986) (establishing a four-part test for determining whether a procedural rule is an independent and adequate state ground). In procedural default cases, the state court or courts reject a direct or post-conviction appeal because the defendant failed to comply with some state law or rule concerning timeliness, pleading requirements, sufficient evidence, or the like.

The second type of bar, exhaustion, is similarly grounded in respect for state court procedures, but it is federally mandated by AEDPA, *see* 28 U.S.C. § 2254(b)(1)(A), (c), and requires petitioners to give state courts a "fair opportunity" to assess petitioners' claims. *O'Sullivan*, 526 U.S. at 844. Often, federal courts will rule that a petitioner's claim is "defaulted" because the petitioner failed to exhaust his remedies and the time for refiling an appeal in the state court has passed. The unexhausted claim is then classified as "procedurally defaulted" and deemed forfeited absent a showing of cause and prejudice. *See In re Cook*, 215 F.3d 606, 607-08 (6th Cir. 2000).

This second type of procedural barrier, forfeiture by failure to exhaust, is what the district court relied upon in dismissing Abdur'Rahman's prosecutorial misconduct claim. But exhaustion and procedural default are distinguishable in an important sense. A defendant could fail to exhaust a claim without procedurally defaulting if he could return to the state courts to exhaust. Alternatively, as in this case, the defendant could fail to exhaust without defaulting if a clarification in procedural law indicates that he has already taken the necessary action to exhaust. That is, forfeiture by failure to exhaust entails a legal fiction, of sorts. The state court has not rejected an appeal based on a state rule violation; there is no declaration by the state court of an independent and adequate state ground to which the federal court must defer. Instead, the federal court makes a presumption that the state court *would* reject the appeal on independent and adequate state grounds *if* the petitioner tried to file it. But, by declaring the claim forfeited, the federal court saves the petitioner and the state court from respectively preparing and rejecting a futile filing. The federal court then views the claim through the lens of procedural default to determine whether there is cause and prejudice to excuse the default. In short, the crux of forfeiture

by failure to exhaust is that the federal court's default decision rests upon a presumption about what the state court *would* do, rather than respect for what a state court actually *did*. Accordingly, here, the district court's presumption about Tennessee's procedural rules is the factor that renders the promulgation of TSCR 39 an "extraordinary circumstance," permitting possible relief pursuant to Rule 60(b)(6). The district court held that Abdur'Rahman's prosecutorial misconduct claims were forfeited by failure to exhaust because, it (1) presumed that he had to raise his prosecutorial misconduct claims before the Tennessee Supreme Court and (2) found that he failed to do so and that the statute of limitations for returning to state court to exhaust the claims had expired. The district court then analyzed his claim pursuant to the principles of procedural default.

But, pursuant to TSCR 39, Abdur'Rahman was never required to raise his claims before the Tennessee Supreme Court for exhaustion purposes. Accordingly, the speculation supporting the district court's default finding crumbles. It then becomes impossible to see how the State of Tennessee, the federal court, or the dissent here has any interest in upholding the district court's ruling in this case, which contravenes the State of Tennessee's express policy concerning the exhaustion of state remedies. Indeed, enforcing the district court's judgment in this case would *disserve* the comity interests enshrined in AEDPA by ignoring the state court's view of its own law. *See Stringer v. Black*, 503 U.S. 222, 235, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992) ("It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law.").

IV.

We hold that the district court erroneously treated petitioner's motion as a second or successive habeas petition. Because Abdur'Rahman's motion is properly characterized as a motion pursuant to Rule 60(b)(6), we **REVERSE** and **REMAND** the case to the district court to consider whether the motion should be granted, based on the potential merit of Abdur'Rahman's prosecutorial misconduct claims previously found to have been procedurally defaulted.

DISSENT

SILER, Circuit Judge, dissenting. In analyzing the issue presented by this appeal, an important issue of federal law post-ADEPA, as to which the circuits are currently split, I begin from the dual propositions that (1) because Abdur'Rahman in his Rule 60(b) motion does not advance any new claims (and merely seeks reconsideration of the court's earlier procedural default ruling as to the bulk of his prosecutorial misconduct claims), 28 U.S.C. § 2244(b)(1) is the controlling subsection; and (2) the scope of this subsection is less expansive than the text suggests. We know this latter proposition to be true because, though a literal reading of the statute would hold that *any* petition filed after a first would be "second or successive," the Supreme Court has rejected such a view. *See Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (holding that § 2244(b) did not apply to petitioner's second habeas petition because his first had been dismissed as unripe); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S. Ct. 1618, 140 L. Ed. 2d 849 (1998) (holding that § 2244(b) did not apply to petitioner's second habeas petition because his first had been dismissed for want of exhaustion). *But see Stewart v. Martinez-Villareal*, 523 U.S. 637, 646-48, 118 S. Ct. 1618, 140 L. Ed.

2d 849 (1998) (Scalia, J., dissenting); *id.* at 648-52 (Thomas, J., dissenting).

On the other side of the coin, however, it is clear that in considering whether a second petition is "second or successive" for purposes of § 2244(b)(1), substance and not form is determinative. A subsequent filing can be considered a "second or successive habeas corpus application" even if not expressly labeled as such. "In a § 2254 case, a prisoner's motion . . . [respecting] the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application . . . ." *Calderon v. Thompson*, 523 U.S. 538, 553, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998).

The ultimate issue, of course, is just when *is* a numerically second petition or filing indeed "second or successive" for purposes of § 2244(b)(1). Beyond the faint contours set up by *Slack* and *Martinez-Villareal*, the boundaries of the statute are admittedly indefinite. But despite the uncertainty on the fringes, I find this much to be clear: a Rule 60(b) motion that seeks to relitigate a procedural default ruling already once adjudicated in a first habeas petition is "second or successive" under § 2244(b). To hold otherwise would be effectively to eviscerate AEDPA.

In arguing against the applicability of § 2244(b)(1), Abdur'Rahman places heavy reliance on *Slack* and *Martinez-Villareal*, as well as a third case in which the Supreme Court found § 2244(b) inapplicable, *Calderon*, 523 U.S. at 538. It is true that such cases can be read to support the proposition that, at least in some cases, the statute does not mean what it says. The problem, however, is that *Slack, Martinez-*

Villareal, and *Calderon* are all easily distinguished and in fact help Abdur'Rahman's cause little, if at all.

Calderon arguably is not even a "successive" petition case. There, in the course of holding that the court of appeals had abused its discretion in recalling its mandate, the Court found § 2244(b)(1) inapplicable because in recalling the mandate the court of appeals had expressly stated that it had acted on the basis of petitioner's *first* habeas petition. *Calderon*, 523 U.S. at 554. The court of appeals had not "considered matters presented in [the] later filing." *Id.* In basing his Rule 60(b) motion on the Tennessee Supreme Court's newly-promulgated Rule 39, Abdur'Rahman, however, asked the district court below to consider matters going beyond those included in his initial petition.

Slack and *Martinez-Villareal* are of only slightly greater relevance. In both of these cases, the dismissal of the petitioner's first habeas petition was not "on the merits." *Slack*, 529 U.S. at 489 (first habeas petition dismissed as unripe); *Martinez-Villareal*, 523 U.S. at 645-46 (first habeas petition dismissed for failure to exhaust). Despite Abdur'Rahman's efforts to characterize the dismissal of his petition for procedural default as a purely procedural dismissal that failed to reach the merits of his claim, we have consistently held that procedural default determinations are "on the merits." *See In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000); *see also Carter v. United States*, 150 F.3d 202, 205-06 (2d Cir. 1998); *Bates v. Whitley*, 19 F.3d 1066, 1067 (5th Cir. 1994). As we noted in *Cook*, lack of ripeness and failure to exhaust are defects which may ultimately be cured, at such time allowing the petitioner to bring his claim before a federal court. *Cook*, 215 F.3d at 608. Procedural default, on the other hand, is an incurable defect, absent a showing of cause and prejudice. *Id.* Where a district court has found procedural

default and a lack of cause and prejudice, that finding fully disposes of the petitioner's claims.

In the final analysis, it is this fact - that Adbur'Rahman's prosecutorial misconduct claims were adjudicated "on the merits" - that makes this case different. The question may fairly be asked: if a Rule 60(b) motion that seeks to relitigate a claim already adjudicated "on the merits" in a first habeas petition is not "second or successive," what is? Abdur'Rahman was entitled to an adjudication; he got it. It is not the province of this court to sit in judgment of Congress's prohibition against rehashing claims - only to recognize it.[1] The fact of a "subsequent legal development" does not change this. AEDPA cannot be whimsically cast aside. We cannot rewrite the language of the statute to provide for a second merits adjudication when the statute clearly says otherwise. If the statute is to mean anything, it must mean that when a petitioner has had certain claims in a first habeas petition adjudicated "on the merits," a subsequent filing seeking reconsideration of that adjudication is "second or successive."

While my view rests primarily on the recognition that Abdur'Rahman's claims have already been once adjudicated, I note that it is supported by other considerations. For one, AEDPA's structure and history support my conclusion. In AEDPA, Congress dramatically altered the habeas corpus

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[1] The majority asks "how the state of Tennessee, the federal courts, or the dissent here has any interest in upholding the district court's ruling in this case." But I submit that this is the wrong question. This court is not called upon to weigh the various "interests" involved here - only to enforce the plain language of AEDPA.

statute governing successive petitions.[2] Most significant was the removal of any reference to "adjudication" on the "merits." This textual change suggests that Congress intended to relax the standard for what is considered a "petition," and consequently - by inference - what is considered a "successive" petition.

A vital tenet is that AEDPA's limitations on habeas relief trump Federal Rule of Civil Procedure 60(b). *See, e.g., Pitchess v. Davis*, 421 U.S. 482, 489, 95 S. Ct. 1748, 44 L. Ed. 2d 317 (1975) ("Since the exhaustion requirement is statutorily codified, even if Rule 60(b) could be read to apply to this situation it could not alter the statutory command."); *Dunlap v. Litscher*, 301 F.3d 873, 875 (7th Cir. 2002) (Posner, J.) ("Th[e] provisions [of AEDPA] are clear and bar a district court from using Rule 60(b) to give a prisoner broader relief from a judgment rendered by the court in a prisoner's federal habeas corpus . . . proceeding. Otherwise AEDPA's limitations on collateral attack would be set at

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[2] The predecessor version of § 2244(b) read:

> When after an evidentiary hearing *on the merits* of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States . . . release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus on behalf of such a person need not be entertained . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ . . .

28 U.S.C. § 2244(b) (1994) (emphasis added).

naught."); Fed. R. Civ. P. 81(a)(2) ("These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States . . . ."). Also, even if Rule 60(b) could be said to apply, the language of the Rule does not support Abdur'Rahman's position. He made his motion under Rule 60(b)(6), but this subsection does not include mistakes of law. Mistake of law is included in Rule 60(b)(1), but motions made under that subsection must be made "not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). Thus, the time for making such a motion has long since passed, and it assuredly is not the case that AEDPA *expanded* the reach of Rule 60(b) in general or Rule 60(b)(6) in particular. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988) ("Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just,' provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)."); *Klapprott v. United States*, 335 U.S. 601, 613, 69 S. Ct. 384, 93 L. Ed. 266 (1949) (holding that a party may "not avail himself of the broad ' any other reason' clause of 60(b)" if the motion is based on grounds specified in clause (1), which include "mistake, inadvertence, surprise or excusable neglect."). In view of the one-year limitation on claims of a mistake of law or fact, excusable neglect, newly-discovered evidence and like claims for relief under Rules 60(b)(1)-(3) and in view of the general rule that Rule 60(b) may not be used "as a substitute for an appeal" or "as a technique to avoid the consequences of decisions deliberately made yet later revealed to be unwise," *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989), the problem we face today of a conflict between a provision of Rule 60(b) and AEDPA will rarely, if

ever, arise as to the types of claims enumerated in Rule 60(b)(1)-(3).

Although acknowledging the well-established rule that a party may not bring a claim under Rule 60(b)(6) if his claim could be considered under Rule 60(b)(1), the majority dismisses the applicability of Rule 60(b)(1), declaring that "the district court in this case [] did not make a 'mistake' in requiring defendants to appeal to the Tennessee Supreme Court, because they simply had no reason-based on United States Supreme Court law, state law, and federal court precedents-to know otherwise." The majority also holds, however, that Rule 60(b)(6) is applicable here because "the district court erroneously treated petitioner's motion as a second or successive habeas petition." In other words, the majority holds that Rule 60(b)(6) is applicable because the district court had previously made a legal error – failing to recognize that even prior to the promulgation of TSCR 39, Tennessee law did not require criminal defendants to raise their claims before the Tennessee Supreme Court to meet AEDPA's exhaustion requirement. But "this Court has recognized a claim of legal error as subsumed in the category of mistake under Rule 60(b)(1)." *Pierce v. United Mine Workers of Am., Welfare & Retirement Fund for 1950 and 1974*, 770 F.2d 449, 451 (6th Cir. 1985) (citing *Barrier v. Beaver*, 712 F.2d 231, 234 (6th Cir. 1983)) (emphasis added); *accord United States v. Reyes*, 307 F.3d 451, 456 (6th Cir. 2002). To borrow the majority's phrase, it "simply stretches logic" to construe the district court's decision as anything other than a "mistake." And yet the majority does just this without providing a reason to explain how ignorance alone-however justifiable-transforms a court's legal error into something other than a "mistake" for the purposes of Fed. R. Civ. P. 60(b).

The majority nonetheless offers justification for the district court's failure to know the legal exhaustion rule by noting that "TSCR 39 eventually clarified that such an appeal was not, in fact, required." Here, the majority seems to agree with *Adams v. Holland*, 330 F.3d 398 (6th Cir. 2003), in which a panel of this court declared that "Rule 39 *clarifies* existing law rather than *changing* the law." *Id.* at 405 (emphasis added). While the distinction between clarification and change may seem trivial, the *Adams* court recognized that the difference is important in determining the retroactive effect of Rule 39. Because it deemed Rule 39 a mere clarification-that is, Rule 39 made clear what Tennessee's rule always had been-the *Adams* court found that the rule applied retroactively. Conversely, the *Adams* court suggested, if Rule 39 effected a change in the exhaustion requirement, then it is unclear that Rule 39 would apply retroactively in general, in turn raising doubts as to whether Rule 39 would apply to Abdur'Rahman in particular.

Despite calling Rule 39 a "clarification," for purposes of determining whether Abdur'Rahman's claim may be brought under Rule 60(b)(6), the majority undertakes the "extraordinary circumstances" analysis ordinarily utilized when the claim is that there has been a change in the law. While the majority opinion states that it is reasoning by analogy, it is difficult to see how such an analogy would apply unless the "clarification" substantively "changes" the very rule in question. The majority therefore seeks to maintain the "clarification" nomenclature of *Adams*, while infusing it with the meaning of "change."

We are left then with two inescapable options: either Rule 39 merely clarifies what had always been the law, in which case the district court made a legal mistake in holding that Abdur'Rahman had failed to exhaust his claim because he did

not raise it before the Tennessee Supreme Court, or Rule 39 changed the law, in which case *Adams* is wrongly decided, and the majority should make clear that it is overruling that precedent. If the first option is true, then, to the extent Rule 60 motions are now deemed permitted post AEDPA, Abdur'Rahman's claim properly arises under Fed. R. Civ. P. 60(b)(1) rather than 60(b)(6)and the motion should accordingly be dismissed as untimely. If the second option is true, then the change in law raises grave questions as to whether retroactive application of the rule is appropriate in this case.

Finally, while acknowledging that a change in the law alone does not constitute an extraordinary circumstance sufficient to permit relief under Rule 60(b)(6), the majority nonetheless finds that "the district court's presumption about Tennessee's procedural rules is the factor that renders the promulgation of TSCR 39 an 'extraordinary circumstance,' permitting possible relief pursuant to Rule 60(b)(6)." The majority therefore asserts that the promulgation of what is essentially a "new rule" does not constitute an extraordinary circumstance for the purposes of Rule 60(b)(6), but the district court's misapplication of the "old rule" does meet that requirement. Applying this reasoning, it is difficult to see how any change in the law will fail to meet the extraordinary circumstance test.

One other oddity about *Adams* deserves comment. Whether Rule 39 "clarified" Tennessee law or "changed" it, there can be little doubt that it effectively overruled *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). At issue in *O'Sullivan* was whether the option of seeking discretionary review in the Illinois Supreme Court represented an "available" procedure for exhaustion purposes under AEDPA. *See* 28 U.S.C. 2254(c) (a state

prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has a right under the law of the State to raise, by any available procedure, the question presented."). Doubtless, the court noted, the question whether a state review procedure is "available" requires consideration of state law but the question ultimately is a federal one that turns not on the state label given to the procedure but on how the procedure operates in practice. After reviewing the Illinois procedure, which all agree mirrors the Tennessee Supreme Court's discretionary review procedure in all material respects, *O'Sullivan* concluded that the procedure was an "available" one under the federal statute and accordingly claims had to be exhausted there. In the aftermath of *O'Sullivan*, one would have thought that the historical question whether a discretionary-review procedure like Illinois's (or Tennessee's) was a "remedy available in the courts of the State" had finally been decided. As interpreted in *Adams*, however, Rule 39 purports retroactively to change the "available" remedy inquiry a view of the law that not only allows Tennessee to overrule *O'Sullivan* but would allow Illinois to promulgate its own Rule 39 and reverse the outcome of *O'Sullivan* in that very case. Federal law is not that fragile. Availability in the final analysis is a question of federal law that ultimately turns on a "question of objective historical fact," *Wenger v. Frank*, 266 F.3d 218, 226 (3d Cir. 2001), that no State has the authority to change retroactively. *Cf. Carey v. Saffold*, 536 U.S. 214, 223, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) ("Ordinarily, for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears."); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 456, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) (concluding that it was "unable to reconcile the procedural holding of the Alabama Supreme Court . . . with its past unambiguous holdings" on a given procedural issue). Because

Abdur'Rahman relies on our panel decision in *Adams* to bring this claim, I would use this case to overrule that decision.

I do not believe that Abdur'Rahman's Rule 60(b) claim survives AEDPA's bar on second or successive habeas petitions; however if it does, then it should be construed as a claim arising under Rule 60(b)(1), and dismissed as untimely.

The majority's holding today conflicts with not only our own precedent, *see McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) ("We agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition . . . ."), but also with that of our sister circuits. *See, e.g., United States v. Winestock*, 340 F.3d 200, 208 (4th Cir.), *cert. denied*, 540 U.S. 995, 124 S. Ct. 496, 157 L. Ed. 2d 395 (2003); *Dunlap v. Litscher*, 301 F.3d 873, 876 (7th Cir. 2002); *Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998) (per curiam). Of particular relevance is the Eleventh Circuit's recent decision in *Gonzalez v. Secretary for Dep't of Corrections*, 366 F.3d 1253, 1281 (11th Cir. 2004) (recognizing two narrow exceptions - for clerical errors and fraud - to the rule that a Rule 60(b) motion is "second or successive" and noting that "an error of law, even one demonstrated by an intervening decision, does not fit either . . . exception[]"). Only the Second Circuit is of the view that generally "a motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should . . . be treated as any other motion under Rule 60(b)." *Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001).[3] To the extent the Second Circuit believes that

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[3] The Second Circuit reaffirmed this "functional approach in *Harris v. United States*, 367 F.3d 74, 77 (2d Cir. 2004) (nothing that the court held in *Rodriguez* that "relief under Rule 60(b) is

Rule 60(b)(6) motions are different from habeas applications because they "seek[] only to vacate the federal court judgment dismissing the habeas petition," which is "merely a step along the way" to habeas relief, *id.* at 198-99, the dichotomy is a false one. Before AEDPA and since, the Supreme Court has made it clear that abuse of the writ may occur as readily in revisiting federal district court habeas decisions as in revisiting underlying state court decisions. *See, e.g., Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996) (AEDPA's "new restrictions on successive [federal] petitions constitute . . . a restraint on what is called in habeas corpus practice 'abuse of the writ'") (quotation omitted); *McCleskey v. Zant*, 499 U.S. 467, 492-93, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991) (recognizing that the "abuse of the writ" doctrine respects the finality of state court convictions by respecting the finality of a first federal habeas proceeding); *Woo Doo v. United States*, 265 U.S. 239, 241, 44 S. Ct. 524, 68 L. Ed. 999 (1924) (holding that while "the inflexible doctrine of res judicata" did not then apply in habeas proceedings, a petitioner "makes an abusive use of the writ of habeas corpus" when he attempts to use a second federal proceeding to revisit grounds raised in a first proceeding).

Contrary to petitioner's suggestion and to the observations of some courts, this conclusion does not mean that a claimant who brings a Rule 60(b) motion for fraud on the court will have it re-characterized as a "second or successive habeas corpus application" under AEDPA. In the first place, it is not Rule 60(b) that empowers litigants to seek such relief. That

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available with respect to a previous habeas proceeding only when the Rule 60(b) motion attacks the integrity of the habeas proceeding and not the underlying criminal conviction").

authority stems from "the inherent power" of a federal court, which allows it "to vacate its own judgment upon proof that a fraud has been perpetrated upon the court." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). Rule 60(b) acknowledges the point when it says that "this rule does not limit the power of a court . . . to set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(b). AEDPA nowhere purports to alter this "'historic power of equity to set aside fraudulently begotten judgments,'" *Chambers*, 501 U.S. at 44 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 235, 245, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)), even assuming Congress has the power to do so.[4]

In the second place, the conclusion that a fraud-on-the-court claim generally should not be treated as a "successive" petition has much in common with the Supreme Court's conclusion that a petitioner may bring a second petition if the first one was dismissed as unripe (*Slack*) or if the first petition was dismissed for failure to exhaust (*Martinez-Villareal*). Much of the historical debate over habeas corpus litigation has turned on the question of whether res judicata should apply to state court criminal proceedings or federal court habeas corpus decisions - and those res judicata principles contain exceptions that are relevant here. Historically, res judicata did not apply to habeas petitions. *See Fay v. Noia*, 372 U.S. 391, 423, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963) (invoking "the familiar principle that res judicata is

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[4] The majority states that "the dissent offers no reason for permitting Rule 60(b)(3) motions based on fraud while prohibiting motions brought pursuant to the other provisions enumerated in Rule 60(b)." Not true. As explained above, the exception for fraud does not derive from the Rule itself but from a court's inherent power.

inapplicable in habeas proceedings"); *see also Sanders v. United States*, 373 U.S. 1, 7-8, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963). But in the 1966 amendments to 28 U.S.C. § 2244(b), Congress adopted a "qualified application" of res judicata to habeas proceedings. *See McCleskey*, 499 U.S. at 467 (noting that the amendment "establishes a 'qualified application of the doctrine of res judicata'" to habeas proceedings by providing "that a federal court 'need not entertain' a second or subsequent habeas petition 'unless' the petitioner satisfies two conditions" - namely, a new ground for relief that was not deliberately withheld in earlier litigation) (quoting S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966) and 28 U.S.C. § 2244(b) (1966)). And in enacting AEDPA in 1996, Congress imposed additional "restrictions on successive petitions," which again "constitute a modified res judicata rule." *Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996).

That Congress is trying to impose a "modified res judicata rule" on habeas corpus applications helps explain why some repeat habeas corpus petitions are "successive" and why others are not. The doctrine of res judicata has several well-established exceptions to the bar against subsequent actions, each of which accounts for the Supreme Court's prior decisions in this area as well as the appropriate treatment of a fraud-on-the-court motion. *Slack* and *Martinez-Villareal*, for example, are consistent with the res judicata principle that a dismissal without prejudice does not bar a second action on the same claim. *See Restatement of Judgments (Second)* § 20(2) ("A valid and final personal judgment for the defendant, which rests on the prematurity of the action [as did the dismissal on ripeness grounds in *Martinez-Villareal*], or on the plaintiff's failure to satisfy a precondition to suit [as did the dismissal on exhaustion grounds in *Slack*], does not bar another action by the plaintiff instituted after the claim has

matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law."); *see also Martinez-Villareal*, 523 U.S. at 645 ("It is certain that respondent's *Ford* claim would not be barred under any form of res judicata."). Likewise, it has long been true that fraud on the court represents an exception to res judicata. *See United States v. Beggerly*, 524 U.S. 38, 46, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998) (holding that fraud on the court that is "sufficiently gross" "demands a departure from rigid adherence to the doctrine of res judicata") (quotation omitted); *Chambers*, 501 U.S. at 44 (noting that the "historic power of equity to set aside fraudulently begotten judgments is necessary to the integrity of the courts") (citations and quotations omitted). Absent more concrete direction from Congress, there is no reason to think that Congress meant to abandon this traditional understanding of res judicata at the same time that it was seeking to impose a "modified res judicata" rule on successive habeas corpus applications.

This background principle not only helps to explain these exceptions to the "successive" petition bar (and potentially others, though only those consistent with AEDPA), but it also shapes the rule I would follow today and explains why I would reaffirm the essence of our decision in *McQueen*, 99 F.3d at 1335. AEDPA announces a "modified res judicata" bar because it *does* permit "successive" petitions, but only in two discrete settings - new rules of constitutional law and claims of actual innocence - and, even then, only after specific requirements have been met. *See* 28 U.S.C. § 2244(b)(2). Res judicata has never had a general exception for revisiting decisions "on the merits," and indeed the whole point of the doctrine is to establish finality once such decisions have been reached. As a matter of statutory interpretation, moreover, a statute that narrowly permits some

successive petitions due to a change in the law cannot fairly be construed to permit other petitions due to changes in the law. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981) ("[I]t is an essential canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. In the absence of strong indicia of congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.") (quotation and citation omitted). Because AEDPA's limitations on habeas relief trump otherwise applicable Federal Rules of Civil Procedure, as I have noted, the AEDPA requirements must trump a contrary motion under Rule 60(b)(6). In the end, the Rule simply may not give what AEDPA has taken away. *See Pitchess v. Davis*, 421 U.S. 482, 489, 95 S. Ct. 1748, 44 L. Ed. 2d 317 (1975) (holding that "even if Rule 60(b) could be read to apply to this situation [- reopening a judgment in a habeas case -] it could not alter the statutory command").

For the foregoing reasons, I would affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 02-6547/6548

[Filed June 6, 2003]

In re Abu-Ali Abdur'Rahman, Movant (02-6547)	)
Abu-Ali Abdur'Rahman, Petitioner-Appellant (02-6548),	)
v.	)
Ricky Bell, Warden, Respondent-Appellee.	)

Before: MARTIN, Chief Judge; BOGGS, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, Circuit Judges.

ORDER

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 35(a) provides as follows:

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is ORDERED, that the previous decision and judgment of this court is vacated, the mandate is stayed and these cases are restored to the docket as a pending appeal. It is further ORDERED that the execution of sentence is stayed pending further order of this Court.

The Clerk will direct the parties to file supplemental briefs and will schedule these cases for oral argument at a later date.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 02-6547/6548

[Filed March 5, 2003]

In re Abu-Ali Abdur'Rahman, Movant (02-6547)	)
Abu-Ali Abdur'Rahman, Petitioner-Appellant (02-6548),	)
v.	)
Ricky Bell, Warden, Respondent-Appellee.	)

Before: SILER, BATCHELDER and COLE, Circuit Judges.

ORDER

These two cases arise from the district court's order of December 17, 2002 which construed petitioner's Motion for Relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b) as a second or successive petition subject to 28 U.S.C. § 2244 and transferred it to the court of appeals. The district court also denied the motion for relief from the

judgment of April 8, 1998 and dismissed it for lack of jurisdiction.

In case no. 02-6547, which was docketed as the § 2244 application, petitioner moves to transfer the case back to the district court. He also filed a substitute motion to transfer which conforms to the format requirements of Fed. R. App. P. 27. The warden opposes a transfer back to the district court on grounds that the transfer to this court was required by 28 U.S.C. § 1631, *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997). Having carefully considered the arguments raised in the motion to transfer, the substituted motion to transfer and the warden's response, the motion to transfer the case back to district court is DENIED.

In case no. 02-6548, petitioner moves for a certificate of probable cause and/or a certificate of appealability on the issue whether the district court was correct in holding that it had no jurisdiction to grant relief under Fed. R. Civ. P. 60(b) from a judgment denying habeas corpus relief. The appellee warden objects on grounds that the district court's order was not an appealable, final order and, alternatively, that petitioner failed to meet the statutory requirements for a certificate of appealability. Having carefully considered the arguments raised in the motion for a certificate of probable cause and/or certificate of appealability and the warden's response, the motion is DENIED.

R. GUY COLE, JR., Circuit Judge, Concurring in part, and dissenting in part. Because I would entertain petitioner Abu-Ali Abdur'Rahman's appeal of whether the district court correctly held that it had no jurisdiction to grant relief under Federal Rule of Civil Procedure 60(b) from a judgment denying habeas corpus relief, I respectfully dissent from the Court's denial of petitioner's request for a certificate

of probable cause and/or a certificate of appealability on this issue.

In 1996, after Petitioner's conviction and sentence of death were affirmed by the Supreme Court of Tennessee and he failed to obtain post-conviction relief in the courts of Tennessee, Petitioner filed a petition for writ of habeas corpus in federal district court. Petitioner challenged the effectiveness of his trial counsel and alleged prosecutorial misconduct. On April 8, 1998, the district court granted relief on Petitioner's ineffective assistance of counsel claim, but concluded that his prosecutorial misconduct claim had not been exhausted in the state courts. In particular, Petitioner had not sought discretionary review of this claim by the Supreme Court of Tennessee, as the district court concluded was required. Respondent appealed the grant of the writ, but Petitioner did not cross appeal the ruling that the prosecutorial misconduct issue had been procedurally defaulted. This Court reversed the district court's grant of the writ, *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), and the Supreme Court denied certiorari, 534 U.S. 970 (2001).

Meanwhile, in response to the decision of the United States Supreme Court in *Sullivan v. Boerkel*, 526 U.S. 838 (1999), the Tennessee Supreme Court established a new rule, Rule 39, clarifying that it had not been necessary that Petitioner seek rehearing in, or apply for permission to appeal to, the Supreme Court of Tennessee in order to exhaust his available state remedies. Rule 39 made clear that Petitioner's prosecutorial misconduct claim had not been procedurally defaulted.

On November 2, 2001, Petitioner filed in the district court a motion pursuant to Federal Rule of Civil Procedure 60(b) requesting relief from the court's April 8, 1998 judgment.

Relying on the Tennessee Supreme Court's Rule 39, Petitioner requested that the district court set aside its judgment that the prosecutorial misconduct claim was procedurally defaulted, and hear the merits of the claim. Petitioner did not raise any new claims, nor did he rely on newly discovered evidence.

Relying on the law of this Court, the district court construed Petitioner's Rule 60(b) motion as a second or successive application for write of habeas corpus, concluded that it lacked jurisdiction to decide the motion, and transferred the case to this Court pursuant to 28 U.S.C. § 1631. Petitioner filed notices of appeal and requests for certificates of appealability in both this Court and the district court and sought to have the appeals consolidated. Thereafter, this Court denied all relief finding that Petitioners Rule 60(b) motion was properly construed as a "second or successive" habeas petition, and that it did not meet the gatekeeping criteria for such a motion.

Subsequently, the Supreme Court granted certiorari to review our disposition of the Rule 60(b) motion. However, after hearing oral argument, the Supreme Court dismissed certiorari as improvidently granted. Justice Stevens dissented from the Supreme Court's dismissal of certiorari in this case, concluding that "[t]he Court of Appeal for the Sixth Circuit plainly erred when it characterized petitioner's Rule 60(b) motion as an application for second and successive petition and denied relief for that reason." *Abdur'Rahman v. Bell*, 537 U.S. __, 123 S. Ct. 594, 599 (2002) (Stevens, J. dissenting).

On December 17, 2002, on remand, the district court entertained, essentially for the second time, Petitioner's Rule 60(b) motion. That court denied relief and dismissed the

matter for lack of jurisdiction. It is this order denying relief that Petitioner now seeks to appeal.

Because I am convinced by Justice Stevens's dissent and believe that this Court's decision in *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) is both wrongly decided and inapplicable in this case, I would allow Petitioner's certificate of appealability and vote to hear the Rule 60(b) issue en banc.

This Court held in *McQueen* that "a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition and therefore is subject to cause and prejudice analysis." 99 F.3d at 1335. As Justice Stevens suggested in his dissent in this case, this conclusion improperly conflates Rule 60(b) motions and "second or successive" habeas petitions. *See Abdur'Rahman v. Bell*, 123 S.Ct. at 597-98 (quoting *Mobley v. Head*, 306 F.3d 1096, 1100-1105 (11th Cir. 2002)). As other courts have concluded, these types of motions are distinct in both purpose and effect. *See, e.g., Rodriguez v. Mitchell*, 252 F.3d 191, 198-99 (2d Cir. 2001). A Rule 60(b) motion is brought to correct a mistake in a judgment resulting, for example, from a procedural error or substantive mistake of law committed by the court. FED. R. CIV. P. 60(b); *see United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002). The effect of a Rule 60(b) motion in the habeas corpus context is merely to re-open the habeas proceedings only perhaps paving the way for a later decision invalidating the petitioner's state court conviction. *See Rodriguez*, 252 at 198. In contrast, a "second or successive" habeas petition is intended, like a habeas petition in the first instance, to directly attack a state court judgment of conviction in order to remedy constitutional violations. *See* 28 U.S.C. §§ 2244, 2254. Thus, the better rule would be to treat Rule 60(b) motions made in the context of habeas corpus proceedings simply as Rule 60(b) motions

and, concomitantly, distinct from "second or successive" habeas petitions.

Alternatively, I would find the rule of *McQueen* distinguishable in certain habeas cases, such as this one. Petitioner does not raise any new claims in his Rule 60(b) motion and, therefore, does not seek to invalidate his state court conviction through the Rule 60(b) motion. Instead, Petitioner merely seeks to re-open a federal habeas corpus proceeding based upon a clear error in the district court's interpretation of Tennessee's exhaustion requirements. I believe that Rule 60(b) provides the proper mechanism for such a request.

Ultimately, I would conclude that Petitioner has made a substantial showing of the denial of a constitutional right with respect to his Rule 60(b) motion. The evidence suggests that the prosecutor may have committed misconduct that impacted the jury's decision to award a sentence of death in this case. The district court's clearly erroneous procedural ruling should not be permitted to bar review of the merits of this serious constitutional claim. For the reason stated above, as well as the reasons set forth in Justice Stevens's dissent from the dismissal of certiorari in this case, I would grant the certificate of appealability in this matter, and vote to hear Petitioner's appeal of the Rule 60(b) issue en banc.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 03:96-0380

[Filed December 17, 2002]

Abu-Ali Abdur'Rahman,	)
	)
v.	)
	)
Ricky Bell, Warden,	)
	)
	)

Judge Campbell
Capital Habeas Corpus

ORDER

Pending before the Court is Petitioner's Motion for Relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 286). The Court held a hearing on the Motion on December 16, 2002. For the reasons described herein, the Court finds that the Motion is a second or successive petition subject to 28 U.S.C. § 2244 pursuant to *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996). Accordingly, the case is transferred to the Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1631, in accordance with *In re Sims*,

111 F. 3d 45 (6th Cir. 1997). The Motion under Fed. R. Civ. P. 60(b) for relief from the judgment of April 8, 1998 is denied and dismissed for lack of jurisdiction. There being nothing further pending before the Court, this Order is a final Order in all respects.

A review of the Order (Docket No. 267) entered on November 27, 2001 is instructive for understanding the pending Motion. The prior Order states as follows:

> Pending before the Court is Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 254). Because the Motion is a second or successive petition subject to 28 U.S.C. § 2244, this case is transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and *In re Sims*, 111 F.3d 45 (6th Cir. 1997).
>
> Petitioner, in this capital habeas corpus case, has moved pursuant to Fed. R. Civ. P. 60(b) for relief from this Court's Judgment of April 8, 1998 (Docket Nos. 205 and 206). *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D. Tenn. 1998), *aff'd in part and rev'd in part*, 226 F.3d 696 (6th Cir. 2000), *cert. denied*, 122 S.Ct. 386 (2001), *pet. for reh'g pending*. The Rule 60(b) Motion is predicated upon a new Tennessee Supreme Court Rule, Rule 39 ("Rule 39"), adopted on June 28, 2001.[1]

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[1] Tennessee Supreme Court Rule 39 reads as follows:

In all appeals from criminal convictions or post-conviction relief matters from and after Jule 1, 1967, a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following

In the 1998 judgment, this court ruled that certain of Petitioner's claims had not been exhausted in state court and, therefore, were defaulted. Based on new Rule 39, Petitioner asserts that a petition for discretionary review by the Tennessee Supreme Court is not necessary for exhaustion purposes and, therefore, the claims in question were exhausted and the Court must now rule on the merits of those claims.

Respondent asserts that this Rule 60(b) Motion is actually a second or successive petition subject to 28 U.S.C. § 2244. The proper procedure, according to Respondent, is for this Court to transfer the matter to the Sixth Circuit for its determination of whether the Rule 60(b) Motion satisfies the gateway criteria of 28 U.S.C. § 2244(b). Respondent relies primarily on *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996). In *McQueen*, the Sixth Circuit held "[w]e agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition..." *Id. See, also, United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998); *Thompson*

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an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim or error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotate, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

Tenn. S.Ct. R.39.

v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998) (en banc); *Felker v. Turpin*, 101 F.3d 657, 660-61 (11th Cir. 1996); and *United States v. Hernandez*, 158 F.Supp.2d 388, 391 (D. Del. 2001).

Petitioner argues that this Rule 60(b) Motion is not a second or successive petition because it raises no new claims, no new facts, and does not rely on new law. Petitioner relies primarily on *Rodriquez v. Mitchell*, 252 F.3d 191, 198-200 (2nd Cir. 2001). In *Rodriquez*, the Second Circuit held "a Motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b)." *Id.* at 198.

In the Sixth Circuit, when a petitioner raises new matters in a Rule 60(b) Motion challenging the previous denial of a § 2254 habeas corpus petition, the Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive petition. *McQueen v. Scroggy*, 99 F.3d at 1334-35. 28 U.S.C. § 2244(b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

Because this Rule 60(b) Motion presents a new theory predicated on a new rule of law adopted by the Tennessee Supreme Court over three years after this Court's Judgment, the Court finds that the Motion is a second or successive habeas petition subject to 28 U.S.C. § 2244. Accordingly, this Court is without jurisdiction to decide the Rule 60(b) Motion. The case

is hereby transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and *In re Sims*, 111 F.3d 45 (6th Cir. 1997).

The United States Supreme Court granted Abdur'Rahman's petition for a writ of certiorari on April 23, 2002, to resolve, in part, the question of whether relief from judgment is available in a habeas corpus case under Fed. R. Civ. P. 60(b) or whether such relief is available only under the provisions of 28 U.S.C. § 2244(b). *Abdur'Rahman v. Bell*, 122 S.Ct. 1605 (2002) (mem.) (granting certiorari). 70 U.S.L.W. 3650 (U.S. April 23, 2002) (listing the question on which certiorari was granted). On December 10, 2002, the Supreme Court dismissed the writ of certiorari as improvidently granted.

In an opinion dissenting from that dismissal, Justice Stevens states that "[t]he Court's decision to dismiss the writ of certiorari as improvidently granted presumably is motivated, at least in part, by the view that the jurisdictional issues presented by this case do not admit of an easy resolution." *Abdur'Rahman v. Bell*, 537 U.S.___, ___ (No. 01-9094 (Dec. 10, 2002)) (Stevens, J. dissenting) (Slip Op. at 1). Justive Stevens' opinion cites an October 24, 2002, Order of the Supreme Court issued two weeks before oral argument, directing the parties to file supplemental briefs on the question of whether "the Sixth Circuit [had] jurisdiction to review the District Court's order, dated November 27, 2001, transferring petitioner's Rule 60(b) motion to the Sixth Circuit pursuant to 28 U.S.C. 1631." *Id.* (Slip Op. at 1 n. 1). Petitioner contends that the jurisdictional issue arose because of the absence of an order by this Court stating explicitly that Abdur'Rahman's motion for relief from judgment filed under Fed. R. Civ. P. 60(b) was "dismissed" for lack of jurisdiction. *See* Transcript of Oral Argument in *Abdur'Rahman v. Bell* (U.S. Nov. 6,

2002), at 2-6 (reporting questions by the Court indicating that the jurisdictional issue arose "when the district court transferred" the motion to the Court of Appeals without "enter[ing] a judgment against [Petitioner] under [Fed. R. Civ. P.] 60(b) to... test whether this is a 60(b) case or a habeas case").

Petitioner now again moves this Court under Fed. R. Civ. P. 60(b) for relief from this Court's April 8, 1998 Order denying him relief from his capital sentence based on various claims of prosecutorial misconduct. The pending Motion relies on the same underlying grounds for relief from judgment that he presented to this Court in the prior Motion entitled "Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b)," dated November 2, 2001 (Docket No. 254).

The pending Motion states clearly that Petitioner has not sought and is not seeking to file a successive petition or otherwise seeking relief from this Court's April 8, 1998 judgment under 28 U.S.C. § 2244, and that the exclusive basis for the relief he seeks is Fed. R Civ. P. 60(b). As is stated in this Court's November 27, 2001 Order, this Court has no jurisdiction to grant relief under Fed. R. Civ. P. 60(b) from a judgment denying habeas corpus relief, because 28 U.S.C. § 2244 provides the only avenue of relief from a habeas corpus judgment under the law of the Sixth Circuit as set forth in *McQueen v. Scroggy*, 99 F.3d at 1334-35.

The parties vigorously contest whether *McQueen* is correctly decided. Nevertheless, the Court is required to follow *McQueen* unless and until it is overruled by the Court of Appeals of the Sixth Circuit. This is especially so in this case since this Court's application of *McQueen* in this case was previously affirmed by the Sixth Circuit. For this reason,

the pending Motion under Fed. R. Civ. P. 60(b) for relief from this Court's April 8, 1998 judgment must be and is hereby denied and dismissed for lack of jurisdiction.

In conclusion, for the reasons described above, this case is transferred to the Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1631, in accordance with *In re Sims*, 111 F.3d 45 (6th Cir. 1997). The Motion under Fed. R. Civ. P. 60(b) for relief from the judgment of April 8, 1998 is denied and dismissed for lack of jurisdiction. There being nothing further pending before the Court, this Order is a final Order in all respects, including for purposes of appeal.

IT IS SO ORDERED.

/s/_____
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:96-0380

[Filed December 19, 2002]

Abu-Ali Abdur'Rahman,	)
	)
v.	)
	)
Ricky Bell, Warden,	)
	)
	)

Judge Campbell
Capital Habeas Corpus

ORDER

Pending before the Court is an Application for a Certificate of Probable Cause to Appeal and/or for a Certificate of Appealability (Docket No. 291). For the reasons described herein, the Application is DENIED.

A brief history of this case is instructive in understanding the context of the pending Application. By Order (Docket No. 270) entered on December 4, 2001, the Court denied a similar Application as follows:

Pending before the Court is Petitioner's Application for Certificate of Appealability (Docket No. 269). For the reasons described herein, the Court is without jurisdiction to rule on the Application.

By Order (Docket No. 267) entered on November 27, 2001, the Court ruled that it was without jurisdiction to decide Petitioner's Rule 60(b) Motion because the Motion was a second or successive petition subject to 28 U.S.C. § 2244. The Court, accordingly, ordered the case transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and *In re Sims*, 111 F.3d 45 (6th Cir. 1997).[1]

Petitioner's Application for Certificate of Appealability asks the Court to grant a certificate of appealability. See 28 U.S.C. §§ 2253(c); Fed. R. App. P. 22(b); *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). According to Petitioner: Specifically, a COA should issue because reasonable jurists could disagree (and have disagreed) with this Court's conclusions that: (1) Every 60(b) motion in a habeas case is a second or successive petition; (2) Tennessee Supreme Court Rule 39 is a "new" rule of law; and (3) Abu-Ali Abdur'Rahman is not entitled to relief, despite egregious prosecutorial

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[1] The Court also notes that this case was on appeal at the time the Rule 60(b) Motion was filed in this Court and that it remains on appeal at this time. Therefore, the Court generally lacks jurisdiction over the case due to the appeal. See *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976) regarding the procedure for a District Court to act on a Rule 60(b) motion to vacate a judgment that is on appeal.

> misconduct, including deliberate falsification of evidence pivotal to the death sentence.
>
> Application, Docket No. 269, p.1.
>
> For the reasons stated in the prior Order (Docket No. 267), the Court finds that it does not have jurisdiction to rule on petitioner's Application for Certificate of Appealability.

(Docket No. 270).

On December 10, 2002, Petitioner filed a Motion for Relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 286). The Court ruled, in pertinent part, as follows:

> For the reasons described herein, the Court finds that the Motion is a second or successive petition subject to 28 U.S.C. § 2244 pursuant to *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996). Accordingly, the case is transferred to the Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1631, in accordance with *In re Sims*, 111 F.3d 45 (6th Cir. 1997). The Motion under Fed. R. Civ. P. 60(b) for relief from the judgment of April 8, 1998 is denied and dismissed for lack of jurisdiction. There being nothing further pending before the Court, this Order is a final Order in all respects.

(Docket No. 289).

As with the Order (Docket No. 270) entered on December 4, 2001, this Court does not have jurisdiction to rule on the Application for a Certificate of Probable Cause to Appeal

and/or for a Certificate of Appealability. The Court does not have jurisdiction because the Court did not have jurisdiction over the underlying Motion for relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 286) since it is a second or successive petition, subject to 28 § U.S.C. § 2244, pursuant to *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996).

To the extent that the underlying Motion for Relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 286) is construed to be a Rule 60(b) Motion, rather than a second or successive petition, no certificate of appealability or certificate of probable cause is necessary for Petitioner to appeal.

Accordingly, the Application is DENIED for lack of jurisdictions.[2] It is the intention of the Court that this is a final Order, there being nothing further pending before the Court.

The Clerk shall send a copy of this Order to the Clerk of the Sixth Circuit Court of Appeals.

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[2] In the event the Court of Appeals for the Sixth Circuit determines that this Court has jurisdiction over Petitioner's Motion for Relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b), Petitioner's Application for a Certificate of Appealability is granted on the issue of whether 28 U.S.C. § 2244 bars review of the merits of Petitioner's purported Fed. R. Civ. P. 60(b) Motion (Docket No. 286) which this Court has held is a second or successive habeas petition, although Petitioner filed it as a Rule 60(b) motion.

IT IS SO ORDERED.

/s/_____
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

IN RE: ORDER ESTABLISHING RULE 39, RULES OF THE SUPREME COURT OF TENNESSEE: EXHAUSTION OF REMEDIES

[Filed June 28, 2001]

ORDER

In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power. Tenn. R. App. Proc. 11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below.

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

FOR THE COURT:

/s/ _____
Riley Anderson, Chief Justice

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

No. 3:96-0380

[Filed April 8, 1998]

ABU-ALI ABDUR'RAHMAN	)
	)
v.	)
	)
RICKY BELL	)
	)

TODD J. CAMPBELL,
UNITED STATES DISTRICT JUDGE

MEMORANDUM

I. Introduction

Petitioner, Abu-Ali Abdur'Rahman[1], has been sentenced to death by electrocution for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C.

[1] Petitioner has changed his name from James Lee Jones to Abu-Ali Abdur'Rahman.

§ 2254, challenging both his conviction and sentence. The Court held an evidentiary hearing in this matter beginning on February 6, 1998. For the reasons set forth below, the Court issues the writ of habeas corpus as to Petitioner's death sentence, but denies issuance of the writ as to Petitioner's conviction.

The basis of the Court's opinion, as is described in detail herein, is that Petitioner was unconstitutionally sentenced to death because he did not receive the effective assistance of counsel guaranteed by the Sixth Amendment. This Court, along with the state post-conviction trial and appellate courts, finds that trial counsel for Petitioner failed to adequately represent their client. This Court further finds that Petitioner was seriously prejudiced by utterly ineffective assistance of counsel at his sentencing hearing. Trial counsel, for instance, failed to investigate and inform the jury about Petitioner's unstable mental history and bizarre family background. The jury, as a result, did not hear significant mitigating evidence before deciding whether to sentence Petitioner to death. This is not to suggest that Petitioner, or anyone with an unstable mental history or bad childhood, cannot be sentenced to death. However, a sentence of death must be imposed in accordance with the Constitution and in this case was not. This is not a case where counsel presented the jury with most of the available mitigation evidence and merely missed some evidence. This is not an instance of harmless error. Despite an abundance of mitigating evidence, there was virtually a complete failure by counsel to present a defense to the jury at Petitioner's sentencing. Accordingly, as is more fully discussed in Section VIII, Ineffective Assistance of Counsel, the Constitution has been violated and the writ of habeas corpus must issue as to Petitioner's death sentence.

II. Proceedings in the State Courts

Petitioner was tried and convicted of first degree murder, assault with intent to commit murder, and armed robbery. (Addendum 1, at 2000). After a subsequent sentencing hearing, Petitioner received the death penalty for the first degree murder conviction. The jury found the existence of three aggravating circumstances: (1) Petitioner had been convicted of prior violent felonies (assault with a deadly weapon and second degree murder); (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while the Petitioner was engaged in committing or attempting to commit a first degree murder or robbery. (Addendum 1, 1986-2001). The court sentenced the Petitioner to life on each of the other offenses, to be served consecutively to each other. (Addendum 1, at 13-14).[2]

Petitioner was represented at trial by Lionel Barrett and Sumter Camp. After trial, Mr. Barrett and Mr. Camp withdrew, and the state court appointed Richard Dinkins to represent Petitioner on direct appeal to the Tennessee Supreme Court. (Addendum 1, Technical Record, at 87). The Tennessee Supreme Court affirmed Petitioner's conviction and sentence. *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990).

The state court appointed another attorney to assist Mr. Dinkins in the post-conviction proceedings, who was joined

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[2] The court also determined that, if the death sentence were to later be reduced to a life sentence, that sentence would be served consecutively to the other life sentences. (Addendum 1, at 14). In addition, the state sentences would be served consecutively to the federal sentence for which Petitioner was on parole when he was convicted of the state offenses. (*Id.*)

by a volunteer lawyer from the Capital Case Resource Center. (Addendum 11, Technical Record, at 23, 50, 82). The post-conviction trial court found trial counsel had been ineffective in their representation of Petitioner at sentencing. (Addendum 11, at 81-109). The court, however, went on to find that trial counsel's deficiencies did not result in prejudice to the Petitioner and rejected all other claims. (*Id.*) The Tennessee Court of Criminal Appeals[3] affirmed that judgment, and the Tennessee Supreme Court denied Petitioner's application for permission to appeal. *Jones v. State*, 1995 Tenn. Crim. App. LEXIS 137, 1995 WL 75427, at *2 (Tenn. Crim. App. Feb. 23, 1995).

The post-conviction trial court gave the following summary of facts in its opinion:

> The facts are that petitioner and his codefendant, Harold Deval Miller, went to the victims home. Petitioner wants to describe the events that took place after that as a misguided attempt to rid the community of drug dealers, as it appears that the victim, Patrick Daniels, was a small time marijuana dealer. Codefendant, Mr. Miller, testified for the State, however, and he described the motive for the visit as robbery. The victim, Patrick Daniels, lived with Norma Norman. Petitioner and Miller entered the home and bound Daniels and Norman. What happened next is described in the appellate decision.
>
> > The victim in this case was bound, gagged, and blind folded with duct tape. He was

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[3] The panel consisted of only two judges, rather than the usual three judges.

> distressed, crying, and begging not to be hurt. Defendants stood over him and stabbed him six (6) times, four (4) times penetrating the heart. He then watched as the victim went into convulsions, blood spewing from his nose and mouth. His accomplice testified, "he was working himself up on a rhythm," he was "cooi" and "under control." The victim continued to plead with the defendant as he was being stabbed.
>
> *State v. Jones*, 789 S.W.2d at 550. The defendant also stabbed Norma Norman numerous times, but she miraculously survived the attack.

(Addendum 11, 83-84).

III. Proceedings in this Court

Prior to the evidentiary hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶ C7(1),(4), C8) were unconstitutional. (Docket Nos. 123, 124). The Court granted summary judgment to the Respondent on the following claims: the Batson challenge (Amended Petition, at ¶ C2(2)); exclusion of jurors based on religious beliefs (¶¶ C2(3),(4)); failure to exclude certain jurors for cause (¶ C2(5)); sufficiency of evidence of robbery and first degree murder (¶ C3); inadequate proportionality review (¶ C9); prosecutor's questions during guilt phase (¶ D4); prosecutorial misconduct involving publication of indictments to jury (¶ D6); cross examination of Petitioner at sentencing (¶ D7); and State's argument at sentencing regarding the Southeastern Gospel

Ministry (¶ D8(4)). (Docket Nos. 156, 157). The Court denied summary judgment on Petitioner's conflict of interest and ineffective assistance of counsel claims, having found the existence of a factual dispute. (*Id.*) The Court denied Respondent's motion for summary judgment on procedural default issues because Petitioner raised factual issues regarding actual innocence in response to the motion. (Docket Nos. 133, 134).[4]

IV. Procedural Defenses

A. Generally

Respondent argues that the Court should not reach the merits of several of Petitioner's claims because Petitioner failed to raise those claims in state court, and has, therefore, procedurally defaulted those claims. Petitioner argues that none of his claims are procedurally defaulted because: (1) all the claims Petitioner raises have been presented to the state courts; (2) the ineffectiveness of Petitioner's counsel in the state courts and prosecutorial misconduct provide cause for any failure to raise a claim; and (3) Petitioner is actually innocent of the crime for which he has been convicted, and of the death penalty.

Subsections (b) and (c) of 28 U.S.C. § 2254 require a habeas corpus petitioner to exhaust the remedies available to him in state court before raising claims in federal court. If the petitioner has no remedy currently available in state court, however, the exhaustion requirement is satisfied. *Gray v.*

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[4] Respondent also filed a Motion in Opposition to an Evidentiary Hearing (Docket No. 110), which the Court denied. (Docket No. 116).

Netherland, 518 U.S. 152, 116 S. Ct. 2074, 2080, 135 L. Ed. 2d 457 (1996); *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 1068-69, 103 L. Ed. 2d 334 (1989).

Although a claim may be fully exhausted under these circumstances, the petitioner's failure to assert the claim in state court may constitute procedural default. *Id.* As a general rule, procedural default bars the petitioner from raising claims in a federal habeas corpus proceeding that he failed to raise in state court. *Id.* A petitioner may avoid this procedural bar by showing cause for the default, and that prejudice resulted from the default, or by showing that he is actually innocent. *Id.*; *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

B. Exhaustion

First, Petitioner argues that his claims are not procedurally defaulted because they have all been exhausted. Exhaustion requires that petitioners "fairly present" federal claims to the state courts to provide them with an opportunity to correct alleged violations of its prisoners' federal rights. *Picard v. Connor*, 404 U.S. 270, 92 S. Ct. 509, 512, 30 L. Ed. 2d 438 (1971). A claim has been "fairly presented" if the petitioner identified the specific constitutional guarantee allegedly violated, as well as a statement of the facts which entitle the petitioner to relief. *Gray*, 116 S. Ct. at 2081.

It is not enough to make a general reference to a constitutional guarantee as broad as due process to present the substance of such a claim to a state court. *Gray*, 116 S. Ct. at 2081.

Petitioner argues that many of his claims[5] are exhausted because the Tennessee Supreme Court had the independent

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[5] Those claims are as follows: whether the indictments against Petitioner violated his Fifth, Eighth and Fourteenth Amendment rights (Amended Petition, ¶ C1); whether Petitioner was denied his rights under the Sixth, Eighth and Fourteenth Amendments because he was not permitted to question potential jurors in voir dire regarding their beliefs about parole eligibility (¶ C2(1)); whether the evidence was sufficient to support Petitioner's conviction of assault (¶ C3(3)); whether the trial court erred in instructing the jury that it could return a verdict finding Petitioner guilty of either premeditated murder, felony murder, or both (¶ C4(1)); whether voir dire, arguments and instructions to the jury unconstitutionally defined the elements of premeditation and deliberation in a manner that violated Tennessee law (¶ C4(2)); whether the trial court erred instructing the jury regarding lesser included offenses (¶ C4(3)); whether the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (¶ C4(4)); whether the trial court gave an erroneous definition of reasonable doubt in its instructions to the jury by use of the language "moral certainty" (¶ C4(5); ¶ C7(3)); whether Tennessee law unconstitutionally prohibits presentation of certain specified issues at a capital sentencing hearing (¶ C5); whether the trial court unconstitutionally instructed the jury regarding the felony murder aggravating circumstance (¶ C7(2), ¶ C8); whether the trial court unconstitutionally instructed the jury that sympathy could not be a factor in its sentencing decision (¶ C7(5)); whether the sentencing instructions as a whole were unconstitutional (¶ C6); whether jury instructions regarding mitigating circumstances at the sentencing phase of the trial were unconstitutional (¶¶ C7(6),(7),(8),(9),(10),(11),(12),(13),(14),(15)); whether the Tennessee Death Penalty Statute is unconstitutional (¶ C10); whether the prosecution made improper closing argument at the guilt phase of trial regarding the term "pure pleasure" (¶ D5(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶ D8(1)-(3),(5)-(8)).

duty to review each claim that could be based upon the record on appeal even if the claim was not raised by the Petitioner. Petitioner cites Tennessee Code Annotated Section 39-2-205(a), which was in effect at the time of Petitioner's trial, to support his argument.

That statute provided for automatic direct review by the Tennessee Supreme Court where the death penalty has been imposed. Tenn. Code Ann. § 39-2-205(a). The statute required that the court review the death sentence to determine: (1) whether the sentence was imposed in an arbitrary fashion; (2) whether the evidence supported the findings of an aggravating circumstance(s); (3) whether the evidence supported the finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance(s) so found; and (4) whether the death sentence is disproportionate to the penalty imposed in similar cases. Tenn. Code Ann. § 39-2-205(c) (repealed and replaced by Tenn. Code Ann. § 39-13-206(c)(1)).

The Court is not persuaded that this statute excuses the requirement that the Petitioner present issues to the state courts in the first instance, at least with respect to issues not specifically delineated in the statute. Accepting Petitioner's argument would essentially eviscerate the exhaustion requirement because defendants would have no incentive to raise issues in the state court. The exception Petitioner advocates would also undermine the principles of comity and federalism upon which the exhaustion requirement is based. *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 2554-55, 115 L. Ed. 2d 640 (1991). Accordingly, the statutory requirement that the Tennessee Supreme Court review a death

sentence does not satisfy the exhaustion requirement as to those issues not addressed in the statute.[6]

Petitioner argues that the exhaustion doctrine does not require a petitioner to seek discretionary review of a claim before the state's highest court. Petitioner argues that presentation of claims to the Tennessee Court of Criminal Appeals on appeal of the denial of his post-conviction petition was sufficient for purposes of exhaustion because that was the last court to which he was entitled to appeal as of right. Although there is a split of authority on the issue, *see Dolny v. Erickson*, 32 F.3d 381, 383-84 (8th Cir. 1994)(and cases cited therein), the Sixth Circuit has held that a petitioner must seek discretionary review of a claim from a state's highest court in order to satisfy the exhaustion requirement. *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). That the Tennessee Supreme Court exercises only discretionary review of post-conviction matters, therefore, does not excuse the Petitioner from raising his claims before that court.[7]

Petitioner argues other claims are exhausted for various reasons. First, Petitioner argues that he has exhausted his claim that the evidence at trial was insufficient to support his conviction of assault by presenting it to the Tennessee Supreme Court in his application for discretionary review. (Amended Petition, ¶ C3(3)). Petitioner contends that he presented this claim to the court because it is related to his

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[6] Respondent does not allege that Petitioner's claims that track the statute are procedurally defaulted.

[7] Petitioner contends that his ineffective assistance of appellate counsel claim (Amended Petition, ¶ F) is exhausted based on this argument. Given the Court's rejection of this argument, the exhaustion doctrine applies to bar this claim.

argument that the evidence was insufficient to support premeditation and deliberation, in that both claims involve Petitioner's condition at the time of the offense. The Court is not persuaded, however, that this claim was fairly presented to the court simply because Petitioner's mental state was a basis for both claims. Thus, Petitioner's sufficiency of the evidence supporting assault claim has not been exhausted.

With respect to his claim that voir dire, arguments and instructions to the jury unconstitutionally defined the elements of premeditation and deliberation (Amended Petition, ¶ C4(2)), Petitioner argues that he raised the substantial equivalent of this claim by arguing that the evidence was insufficient to support a finding of premeditation or deliberation under *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992), a case involving jury instructions on these elements. Resolving a sufficiency of the evidence claim, however, does not require a court to determine whether the court erred in its jury instructions. This claim was not fairly presented to the state court, and therefore, has not been exhausted.

Petitioner next argues that he has exhausted his claim that the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (Amended Petition, ¶ C4(4)). Petitioner contends that he raised the substantial equivalent of this claim by arguing to the Tennessee Supreme Court on direct appeal that it was fundamentally unfair to predicate his first degree murder conviction solely on the basis of the uncorroborated testimony of co-defendant Harold Devalle Miller. But, as stated above, resolving Petitioner's fundamental fairness claim would not require the court to review the jury instructions on this particular issue. Accordingly, this claim was not fairly presented to the state courts, and has not been exhausted.

Petitioner argues that his claim challenging the constitutionality of the Tennessee Death Penalty Statute (Amended Petition, ¶ C10) was raised on direct appeal to the Tennessee Supreme Court, because he stated in his brief:

> D. As Applied To The Facts Of This Case, The Imposition Of The Death Penalty Constitutes A Deprivation Of Due Process Of Laws, Equal Protection Of Laws And Cruel And Inhuman Treatment In Violation Of The Fifth, Eighth And Fourteenth Amendments To The United States Constitution And Article I, Sections Eight And Sixteen Of The Tennessee Constitution And, Further, Is Disproportionate To The Sentence Imposed In Similar Cases
>
> In addition to the arguments set forth in Section II A, B, C and D, *supra.*, defendant submits that, taking this case as a whole, the imposition of the death penalty was improper and constitutes a deprivation of life without due process of law and cruel and inhuman treatment. . .

(Brief of the Appellant, at 59 (Addendum 2)). The brief then goes on to address the proportionality issue.

Despite the language in the heading, the brief does not specify, "as applied to the facts of this case," why the death penalty statute is unconstitutional, and what facts support the constitutional challenge. Under these circumstances, the Court concludes that Petitioner did not fairly present his constitutional challenge to the Tennessee Supreme Court on direct appeal.

Petitioner also points out that he challenged the "heinous, atrocious and cruel" aggravating circumstance in his post-conviction application for permission to appeal to the Tennessee Supreme Court. In a footnote, the brief states: "By discussing only the aggravating circumstance of 'heinous, atrocious or cruel,' *infra*, the Appellant does not waive any previously raised constitutional challenges. The Appellant relies on the arguments previously advanced and ruled upon in his Brief to the Court of Criminal Appeals." (Application For Permission To Appeal, at 21 n.11 (Addendum 15)).

Although the Petitioner referred, in this footnote, to the brief he filed in the Court of Criminal Appeals, he did not attach a copy of that brief to the Application. The Court is not persuaded that referral to arguments made in another document by way of a footnote constitutes a fair presentation of those arguments to the Tennessee Supreme Court. Thus, the Court concludes that this claim has not been exhausted.

In his Amended Petition, Petitioner alleges a number of instances of prosecutorial misconduct, numbered one through eight, with several subissues under each number. In a paragraph under the main heading "Prosecutorial Misconduct," Petitioner states that the prosecution "pursued a consistent course of deception," which violated Petitioner's constitutional rights (Amended Petition, (¶ D)). Respondent has asserted a procedural default defense to most of the claims set forth under this heading.

Petitioner argues, however, that the heading "prosecutorial misconduct," along with the paragraph following that heading, constitute a separate claim to which the Respondent has not asserted a procedural default defense. But the Court does not view this paragraph as a separate claim. The paragraph does not allege specific constitutional

violations, nor does it set forth specific facts in connection with those alleged violations. Therefore, Respondent will not be considered to have waived his procedural default defense to the prosecutorial misconduct claims.

For this same reason, the Court rejects Petitioner's argument that certain specific allegations are not defaulted because they fall within this general prosecutorial misconduct claim.[8]

Petitioner contends that his claims regarding the failure to disclose co-defendant Miller's pretrial statements (Amended Petition, ¶¶ D1(2)-(4)) were fairly raised to the Tennessee Supreme Court in his application for permission to appeal because, in that application, he argued that the prosecution made misleading statements in its argument to the jury. (Application For Permission To Appeal, at 9 (Addendum

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[8] These claims include: whether the prosecution should have disclosed the statements of Norman's children (¶ D1(5)), the redacted portion of Detective Garafola's Report (¶ D1(6)), other police reports (¶ D1(8)), the memorandum in the prosecution's file concerning a bank account in Patrick Daniels' name (¶ D1(9)), the statement of George Daniels/laboratory reports (¶¶ D1(10)(11)), and information regarding Petitioner's bank account (¶ D1(12)). These claims also include whether the prosecution unconstitutionally influenced Harold Devalle Miller's testimony (¶ D2(1)); whether the prosecution provided false information to MTMHI (¶ D2(2)); whether the prosecution improperly attempted to manipulate Norma Norman's testimony (¶ D2(3)); whether the prosecution unconstitutionally misled defense counsel regarding Petitioner's 1972 murder conviction (¶ D3); whether the prosecution made improper closing arguments at the guilt phase of trial (¶¶ D5(1)-(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶ D8(1)-(3),(5)-(8)).

15)). The Petitioner also argued that the prosecution committed discovery violations, but did not mention Miller's pretrial statements.

The Court is not persuaded that this discovery violation claim has been fairly presented to the Tennessee Supreme Court. Determining whether a prosecutor has made a misleading closing argument is not the same as determining whether the prosecution committed a discovery violation. Thus, Petitioner has not exhausted this claim.

Petitioner next contends that he has exhausted his claim that the prosecution provided misleading statements to the Middle Tennessee Mental Health Institute ("MTMHI"). (Amended Petition, ¶ D2(2)). Petitioner argues that he raised this claim in his application for permission to appeal to the Tennessee Supreme Court by reciting the facts upon which the claim is based. Although Petitioner discussed the prosecutor's letter to MTMHI in the "Statement of the Facts" section of the application, he did not raise this issue in arguing that the prosecution had engaged in misconduct. (Application For Permission To Appeal, at xii-xiii, 7-19 (Addendum 15)). The prosecutorial misconduct claims presented to the Tennessee Supreme Court were limited to Petitioner's allegations that the prosecution failed to disclose certain documents in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and that the prosecution made a misleading closing argument. (*Id.*) Although Petitioner alleged facts regarding the prosecution's letter to MTMHI, he did not identify the constitutional violation allegedly shown by those facts. Thus, this claim was not fairly presented to the Tennessee Supreme Court, and has not been exhausted.

Respondent argues that Petitioner's ineffective assistance of counsel claim is procedurally defaulted except as to the

claim that defense counsel conducted a deficient investigation of Petitioner's mental history (Amended Petition, ¶¶ E1-E2(g)). Petitioner raised the ineffective assistance of counsel claim in his post-conviction petition, and described twenty-seven alleged deficiencies by defense counsel. (First Amended Petition For Post-Conviction Relief, at 3-6 (Addendum 11)). As noted above, the trial court held that defense counsel conducted an inadequate investigation of Petitioner's background and mental health history, but determined that Petitioner was not prejudiced by that deficiency. (Memorandum and Order of the Fifth Circuit Court For Davidson County (Addendum 11)). The Court of Criminal Appeals agreed with that assessment. *Jones v. State*, 1995 Tenn. Crim. App. LEXIS 137, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995).

In his application for permission to appeal to the Tennessee Supreme Court, Petitioner argued that prejudice had been shown. (Application For Permission To Appeal, at 1-6 (Addendum 15)). Because Petitioner succeeded in demonstrating that trial counsel's performance was deficient in the lower courts, it was not necessary for the Petitioner to raise all those deficiencies again in arguing that his appeal of the prejudice issue should be accepted. The Court concludes that Petitioner fairly presented the ineffective assistance of counsel claims to the Tennessee Supreme Court.[9]

In conclusion, the only claims that have been exhausted by Petitioner and remain to be decided by this Court are: Petitioner's prosecutorial misconduct claims involving certain

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[9] For the same reason, the Court also concludes that Petitioner has exhausted his claim that trial counsel failed to test the adversarial process. (Amended Petition, ¶ A).

lab reports and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶ D1(1), (7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance (Amended Petition, ¶¶ A, E1-E2(g)).[10] With the exception of these claims, Petitioner has failed to exhaust all the claims to which Respondent has asserted a procedural default defense. Petitioner may no longer present those claims to the state court, however, because they would be barred by the statute of limitations. *See* Tenn. Code Ann. § 40-30-202.[11] Thus, because Petitioner has no remedy currently available in

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[10] Respondent has asserted a procedural default defense as to Petitioner's claim that the cumulative effect of all errors at trial violated Petitioner's due process rights. (Amended Petition, ¶ B). In his brief, Petitioner indicates that this is not a separate claim for habeas relief, but is an argument to be considered in determining whether the state court's alleged errors should be considered harmless. Therefore, the Court will not consider this argument as a separate claim.

[11] Section 40-30-202(a) is part of the Post-Conviction Procedure Act of 1995, Tenn. Code Ann. §§ 40-30-201, *et seq.* With some exceptions not applicable here, Section 202(a) provides that a petition for post-conviction relief must be brought within one year of the date of the final action of the highest state appellate court to which an appeal is taken. The previous post-conviction statute required that a petition be filed within three years of the date of the final action of the highest state appellate court to which an appeal was taken. Tenn. Code Ann. § 40-30-102 (repealed 1995).

The Tennessee Supreme Court denied Petitioner's petition to rehear, on direct appeal, on May 14, 1990. (Addendum 7). Therefore, Petitioner would be barred, under either statute, from seeking to raise these claims through a post-conviction proceeding in state court.

state court, these claims are procedurally defaulted. *See Hannah v. Conley*, 49 F.3d 1193, 1196-97 (6th Cir. 1995).

C. Cause and Prejudice

Petitioner argues that even if his claims are the subject of procedural default, the default should be excused because he can establish cause for the default, and that prejudice resulted from the default. Petitioner also argues that the default should be excused to prevent a fundamental miscarriage of justice in that he is actually innocent.[12]

In order to establish cause, a petitioner must show the procedural default was the result of ineffective assistance of counsel, or "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986). A petitioner may rely on ineffective assistance of counsel to establish cause only if he has presented that claim to the state courts as an independent constitutional claim, and he shows that counsel's incompetence rises to the level of a constitutional violation. 106 S. Ct. at 2645-46.

In order to demonstrate that an objective impediment provided cause for a procedural default, a petitioner may show, for example, that "the factual or legal basis for a claim was not reasonably available to counsel," or that "'some

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[12] Petitioner also argues that certain state procedural rules should not prevent adjudication of claims by this Court. It does not appear, however, that Respondent relies on state procedural rules to bar Petitioner's claims. Instead, Respondent argues that the claims at issue were not raised at all in the state courts. *See Teague*, 109 S. Ct. at 1069; *Coleman v. Thompson*, 111 S. Ct. at 2557 n. 1.

interference by officials'" made compliance with the procedural rule impracticable. *Murray*, 106 S. Ct. at 2645 (citations omitted).

The cause and prejudice standard applies to claims that were defaulted on appeal as well as those defaulted at trial. *Murray*, 106 S. Ct. at 2646.

In this case, Petitioner has presented an independent ineffective assistance of trial counsel claim that is not procedurally defaulted. Petitioner has not specified, however, any errors made by trial counsel that prevented any issues from being raised on appeal. In other words, in reviewing Petitioner's case on direct appeal, the Tennessee Supreme Court did not dismiss any of Petitioner's claims based on the failure of trial counsel to preserve those issues at trial. *See State v. Jones*, 789 S.W.2d 545 (Tenn. 1990).

Petitioner may not establish cause by alleging the ineffectiveness of appellate counsel in failing to present certain issues on appeal because this claim has not been presented to the state courts. (*See* Footnote 7, and accompanying text).[13]

Finally, Petitioner may not establish cause by alleging that post-conviction counsel were ineffective in failing to raise certain issues to the state courts. There is no constitutional right to an attorney in state post-conviction proceedings, and therefore, a petitioner cannot claim constitutionally ineffective

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[13] In any event, the Court notes that a defendant does not have a constitutional right to have every nonfrivolous issue raised on appeal. *See Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 3312-14, 77 L. Ed. 2d 987 (1983).

assistance of counsel regarding those proceedings. *Coleman*, 111 S. Ct. at 2566.[14]

Petitioner also argues that cause is established by the "widespread prosecutorial abuse and judicial bias" which tainted the trial and prevented post-conviction counsel from gaining "an adequate picture of the circumstances surrounding the crime and Petitioner's life." (Petitioner's Memorandum In Response To Respondent's Summary Judgment Motions And In Support Of An Evidentiary Hearing, at 50 (Docket No. 113)). Petitioner does not, however, specify how failure to raise a particular claim on direct appeal or during the post-conviction proceeding was impeded by the prosecution or the state court trial judge. Under these circumstances, the Court is not persuaded that an objective impediment prevented Petitioner from presenting claims to the state courts.

In conclusion, Petitioner has not demonstrated cause for his procedural default. Consequently, the Court need not determine whether prejudice resulted from the procedural default.

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[14] Furthermore, Petitioner has stated that he "is no longer pursuing the issue of ineffective assistance of post-conviction counsel." (Petitioner's Response To Motion To Compel Disclosure Of Documents From His State Court Attorneys' Files, at 2 (Docket No. 140)).

D. Actual Innocence

A petitioner who is unable to demonstrate cause and prejudice for a procedural default may nonetheless avoid a procedural default bar by demonstrating that he is actually innocent. *Murray*, 106 S. Ct. at 2649. In order to fall within the actual innocence exception to the procedural default bar, a petitioner must provide evidence that negates an element of the crime for which he was convicted, or demonstrates that he was not eligible for the death penalty under the applicable state law. *Sawyer v. Whitley*, 505 U.S. 333, 112 S. Ct. 2514, 2521-22, 120 L. Ed. 2d 269 (1992).

A petitioner who claims he is actually innocent of the crime for which he was convicted must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup*, 115 S. Ct. at 867 (quoting *Murray v. Carrier*, 106 S. Ct. at 2649-2650). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* This standard requires "a stronger showing than that needed to establish prejudice." *Id.* (footnote omitted).

To be credible, this claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 115 S. Ct. at 865.

In order to establish actual innocence of the death penalty, a petitioner must provide "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner" eligible for the death penalty under the

applicable state law. *Sawyer*, 112 S. Ct. at 2517. In order to make this showing, the petitioner must focus on those elements which render a defendant eligible for the death penalty, e.g., aggravating circumstances, and not on additional mitigating evidence that was not introduced at sentencing. *Sawyer*, 112 S. Ct. at 2523.

Petitioner claims he is actually innocent of first degree premeditated murder based on (1) the testimony of a forensic pathologist regarding blood splattering at the scene of the stabbings; (2) the testimony of a psychiatric expert that Petitioner was insane at the time of the stabbings, and lacked the capacity to deliberate and premeditate; and (3) the lack of credibility of the testimony of the co-defendant, Harold Devalle Miller. Petitioner also claims he is actually innocent of felony murder because there was insufficient proof of the underlying felony -- theft.[15]

First, Petitioner argues that certain blood splattering evidence supports his claim of actual innocence. At the hearing in this Court, Petitioner presented the testimony of Dr. Kris Sperry, a forensic pathologist, who opined that the assailant would have had blood from the victims' wounds splattered on his body and his clothing. (Transcript of Hearing

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[15] Although he mentions it in his brief, Petitioner does not appear to have asserted a free standing actual innocence claim (that execution of one who is actually innocent violates the Eighth Amendment) in his Amended Petition. In any event, the standard for this claim is even higher than that set forth in *Schlup*. Therefore, the Court is not persuaded that Petitioner has established actual innocence as a separate claim. *Schlup*, 115 S. Ct. at 860-62; *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993); *Carriger v. Stewart*, 132 F.3d 463, 476-77 (9th Cir. 1997).

Beginning on February 6, 1998 ("Transcript"), at 37-38, 77). Petitioner points out, however, that crime lab reports indicate there were no blood stains found on clothes, a coat and two pair of work pants, seized from the Petitioner's apartment two days after the stabbings. (Lab Report, Petitioner's Exhibit 117; Search Warrant, Petitioner's Exhibit 115).

On the other hand, there is no evidence that during the stabbings, Petitioner was wearing the clothes later seized from his apartment. Norma Norman testified that Petitioner was wearing a black coat when he arrived at the apartment. (Addendum I, at 1342-1343). Because Petitioner taped her eyes before the stabbings were committed, however, she could not testify that he was wearing the coat during the stabbings. (Addendum I, at 1375-1378). There was no evidence that he was wearing one of the two pair of pants seized from his apartment two days after the stabbings, or that he had not disposed of the pants worn during the crime.[16]

Although this evidence may have provided a good argument for defense counsel to raise to the jury, the Court is not convinced that reasonable jurors probably would not have convicted Petitioner if they had been presented with this evidence.

Moreover, both Dr. Sperry and Petitioner conveniently overlook the fact that Petitioner admitted that he was guilty at the sentencing phase of the trial:

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[16] Petitioner's failure to dispose of his coat may be explained by his fondness for the coat, which was given to him by his wife as a birthday gift. (Addendum I, at 1454-1455).

> ... But what I am saying is, I'm going to submit to the fact that I am the individual that committed these particular felonies or assaults upon these two people. But I don't remember -- you know, I don't remember too much of why that all of a sudden came to me. All I know is that I'm the man that stabbed Mr. Daniel Patricks (sic) and I'm the man that assaulted Ms. Norma Jean Norman.

(Addendum I, at 1865).

> The only thing that I can recollect is that, when I was over there on this young lady and realized that what I was doing -- I had stopped. The purpose to me, you know, I didn't want -- go over there to hurt nobody. But it was her that I seen underneath me that made me stop. And God spared her life. And after that I left.

(Addendum I, at 1866-67).

> Q. And you heard Mr. Miller testify from the very seat that you're in right now, that you were the man who stabbed Mr. Daniels to death. And you knew it when you were setting there, that that was true, didn't you?
>
> A. That I was the man, yes.

(Addendum I, at 1893. *See also* Addendum I, at 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

Next, Petitioner argues that the testimony of Dr. Robert Sadoff supports his claim of actual innocence. Dr. Sadoff opined that, at the time of the stabbings, Petitioner was insane

because he lacked the substantial capacity to conform his conduct to the requirements of the law. (Transcript, at 523-524).[17] Dr. Sadoff testified that Petitioner was suffering from Post-Traumatic Stress Disorder, which is a mental illness. (Transcript, at 455, 457). Dr. Sadoff also diagnosed Petitioner as having a Borderline Personality Disorder, a mental disorder. (*Id.*)

The Court is not persuaded that Dr. Sadoff's testimony is sufficient to meet the *Schlup* actual innocence standard. First, Dr. Sadoff's diagnosis comes almost twelve years after the crime, and Dr. Sadoff admitted that the passage of time made it more difficult for him to render a diagnosis. (Transcript, at 584-585). On the other hand, a mental evaluation of the Petitioner conducted shortly after the stabbings found that Petitioner was competent to stand trial, and that an insanity defense could not be supported. (Petitioner's Exhibit 150). The evaluation was performed by the staff of MTMHI after observing the Petitioner over a thirty-day period in residence. (*Id.*) Dr. Craddock, who was a member of the MTMHI team that evaluated Petitioner, testified at the hearing in this case. (Transcript, at 83-163). Although the MTMHI staff did not possess all the Petitioner's previous institutional records at the time they made their diagnosis, that diagnosis should not be given less weight than one made twelve years later.

In addition, Dr. Sadoff's opinion is based primarily on Petitioner's claim that he could not remember the stabbings. (Transcript, at 569). Consequently, Dr. Sadoff opined that Petitioner was probably "dissociating" at the time of the

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[17] This was the applicable standard for establishing an insanity defense under Tennessee law at the time of Petitioner's trial. *See, e.g., State v. Clayton*, 656 S.W.2d 344, 346 (Tenn. 1983).

stabbings. (Transcript, at 517-518). As a result, according to Dr. Sadoff, if Petitioner was dissociating, he lacked substantial capacity to conform his conduct to the requirements of the law, or to engage in premeditation and deliberation. (Transcript, at 523-524, 564).

But Petitioner has not always professed an inability to recall the stabbings. The MTMHI records indicate that Petitioner stated he "remembers everything that happened" at the time of the stabbings. (MTMHI Staff Conference Report dated February 19, 1987, Petitioner's Exhibit 150; Transcript, at 97). Nor has Petitioner adhered to the same story. Shortly after his arrest, Petitioner claimed that a third party, Sam Blackstock, was involved in the stabbings. (Transcript, at 210-212). That story turned out to be false. (*Id.*) Finally, although Petitioner insists that the Court should not rely on Petitioner's testimony during the sentencing hearing, Petitioner clearly admitted his guilt at that time. (Addendum I, at 1865-1867; 1893-1894; 1957; 1961; and 1968). Because Dr. Sadoff's opinion strongly relies on the questionable, self-serving statements of the Petitioner, the Court does not attach a great deal of weight to that opinion.[18]

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[18] These would include the statements made by the Petitioner while under hypnosis. Dr. Sadoff admitted that there is no way to determine whether the statements made by the Petitioner while under hypnosis are objective fact. (Transcript, at 504-505, 507, 508, 572, 575). The Court notes that Petitioner did not testify at the hearing to memories purportedly recalled during hypnosis.

During the hearing, the Court held that the hypnosis tape offered by the Petitioner was admissible for the limited purpose of establishing what Dr. Sadoff relied upon in forming his opinion. (Transcript, at 505-516). The Court also determined that the hypnosis tape did not satisfy the requirements of *Daubert v. Merrell*

Petitioner also argues that he is actually innocent because the testimony of co-defendant Miller, which indicated that Petitioner committed the stabbings pursuant to a preconceived plan, is not credible. But this argument is not supported by any "new" evidence, as contemplated by *Schlup*, 115 S. Ct. at 865. *See also McCoy v. Norris*, 125 F.3d 1186, 1190-91 (8th Cir. 1997). Furthermore, the Court is not persuaded that pointing out every inconsistency in Miller's testimony would have led the jury to change its verdict. *See Sawyer*, 112 S. Ct. at 2524 (evidence "brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness'] account of petitioner's actions"). In other words, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Miller's credibility problems.

Petitioner also fails to present new evidence regarding the robbery. Instead, Petitioner argues that none of the witnesses saw the Petitioner take $300 from the apartment, and that it was just as plausible, based on the evidence, that someone else had taken the money. As the Court has determined in a previous Order (Docket Nos. 156, 157), although the evidence was circumstantial, it was still sufficient to allow the jury to find the elements of robbery beyond a reasonable doubt. Consequently, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Petitioner's arguments regarding the lack of sufficient evidence.

Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and declined to admit the statements made on the tape for the truth of the events leading up to and include the stabbings. (*Id.*).

Petitioner also argues that this new evidence also shows he is actually innocent not only of the crime, but also of the death penalty. As discussed above, the *Schlup* Court has pointed out that the standard for establishing actual innocence of the death penalty, set forth in *Sawyer*, is stricter than that required to show actual innocence of the capital crime. The stricter standard requires Petitioner to provide clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. For the reasons explained above, the Court concludes that Petitioner has not shown actual innocence of the death penalty.

Because Petitioner has not established cause and prejudice, or actual innocence, he may not avoid the procedural default of the claims to which Respondent has asserted a procedural default defense. Accordingly, the Court will only address the following claims: Petitioner's prosecutorial misconduct claims involving certain lab reports and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶ D1(1),(7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance (Amended Petition, ¶¶ A, E1-E2(g)).

V. The Trial Court's Instructions Regarding the "Heinous, Atrocious or Cruel" Aggravating Circumstance and Unanimity

Prior to the hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶ C7(1), (4), C8) were unconstitutional. (Docket Nos. 123, 124). For the reasons stated in that opinion, those claims are without merit, and are dismissed.

VI. Brady Violations

As noted above, two of Petitioner's *Brady*[19] claims have been exhausted and are properly before this Court. Petitioner claims that the prosecution should have provided trial counsel with the transcript of his trial in 1972 for murder because, he contends, it would have supported an insanity or mental illness defense. (Amended Petition, ¶¶ D1 (1)). Petitioner also claims that the prosecution should have provided the crime lab analysis indicating that no blood was found on the clothes seized from Petitioner's apartment. (Amended Petition, ¶¶ D1 (7)).

In a series of cases beginning with *Brady v. Maryland*, 83 S. Ct. at 1196-97, the Supreme Court has held that the prosecution must disclose exculpatory evidence to the defense, with or without request. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Suppression of this evidence violates due process if the evidence is material either to guilt or to punishment, regardless of the good faith of the prosecutor. *Id.*

Withheld evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 105 S. Ct. at 3383. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. 105 S. Ct. at 3384. A showing of materiality does not require the defendant to show that the suppressed evidence would have resulted in the defendant's

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[19] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

acquittal. 105 S. Ct. at 3383-84. Materiality is concerned with whether suppression of the evidence undermines confidence in the outcome of the trial. 105 S. Ct. at 3381.

The Supreme Court recently reaffirmed this standard for determining materiality in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 1567-68, 131 L. Ed. 2d 490 (1995). The Court pointed out that "materiality" is not a sufficiency of the evidence test, which would require a defendant to show insufficient evidence to convict after discounting the inculpatory evidence in light of the undisclosed evidence. 115 S. Ct. at 1566. Rather, the defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (footnote omitted).

The Court explained that in considering materiality, a reviewing court is to assess the collective effect of the suppressed evidence in light of the evidence presented at trial. 115 S. Ct. at 1567. Finally, the Court pointed out that, once constitutional error is found under this standard, there is no need for further harmless-error review because the error cannot be found harmless. 115 S. Ct. at 1566-67.

On appeal of the denial of Petitioner's state post-conviction petition, the Tennessee Court of Criminal Appeals considered this issue as follows:

> Appellant next contends that his conviction and sentence were the result of prosecutorial misconduct because the state failed to provide him with exculpatory material as required by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In order to establish a violation of *Brady*, appellant must prove (1) the prosecutor suppressed

> evidence, (2) that the suppressed evidence would have been favorable to the defendant and (3) the materiality of the suppressed evidence.
>
> The evidence claimed to have been suppressed consisted of the transcript of the defendant's 1972 federal murder trial, lab reports on clothing seized from appellant's apartment, a police report about appellant's violent behavior at the time of his arrest, statements by his accomplice, Harold Devalle Miller, a police report suggesting that property belonged to one victim rather than the other, and information relative to the appellant's bank account. None of the above evidence was favorable to the defense. We find no merit to the appellant's claim of prosecutorial misconduct.

Jones v. State, 1995 Tenn. Crim. App. LEXIS 140, 1995 WL 75427, at *3 (Tenn. Crim. App. Feb. 23, 1995).

Whether a *Brady* due process rights violation has occurred presents a mixed question of law and fact which is reviewed *de novo*. *Brown v. Cain*, 104 F.3d 744, 750 (5th Cir. 1977); *Reese v. Delo*, 94 F.3d 1177, 1183 (8th Cir. 1996); *Hays v. Alabama*, 85 F.3d 1492, 1498 (11th Cir. 1996).

In 1972, Petitioner was tried in a Virginia federal court for the murder of a fellow prisoner, Michael Stein. (Petitioner's Exhibit 131). He was convicted of second degree murder. (Exhibit 105). At that trial, a psychiatrist, Dr. Asot M. Masri, opined that Petitioner had been in a "homosexual panic" when

he stabbed Stein.[20] (Petitioner's Exhibit 131, at 48). He testified that the Petitioner had a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). The Government called another psychiatrist, Dr. Robert Eardley, who opined that Petitioner was not suffering from a mental disease when he stabbed Stein. (Petitioner's Exhibit 131, at 57-58, 59, 66).

Petitioner argues that this evidence was exculpatory because the State argued at trial that Petitioner did not suffer from any emotional disturbance.

There is no dispute that the prosecutor had this transcript in his possession at some point before trial began. There is also no dispute that he did not provide the transcript to the defense.[21] Respondent contends that the state court was correct

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[20] Dr. Masri characterized homosexuality as a mental disease. (Petitioner's Exhibit 131, at 51).

[21] During the hearing, the prosecutor explained his reasoning:

> Based on all the testimony, I concluded for two reasons, one the lapse of time or I guess you might say the distance in time between the two events and what I call very weak testimony from the defense psychiatrist at the trial, that it was not exculpatory, would have no bearing on explaining whether at the time of this crime he had a mental illness or suffered from any kind of emotional snapping, because the situation in the federal prison was one where even taken in light most favorable to the defendant was triggered as a result of a sexual assault on him.
>
> That wasn't the case here where the defendant sought out the victim and went to the victim and pursued the victim.

in concluding that the transcript was not favorable to the defense because neither psychiatrist opined that the Petitioner was insane.

The Court believes this information was favorable to the Petitioner because the Petitioner had stated his intention to rely on a mental illness defense at trial and sentencing (Transcript, at 959-60, 963), and Dr. Masri's testimony supported that defense. The Court is not persuaded, however, that the prosecution's failure to provide the transcript to defense counsel rises to the level of a due process violation because Dr. Masri's testimony was not "material."

In a later section of this Memorandum, the Court concludes that Petitioner received ineffective assistance of counsel because his trial counsel failed to investigate his mental health history, background and other areas of mitigation. The Court is not persuaded, however, that "the proceeding would have been different" if the prosecution had disclosed Dr. Masri's testimony to Petitioner's trial counsel. Petitioner's trial counsel already had various clues that should have led them to investigate Petitioner's mental health history, such as the records of Petitioner's evaluation at MTMHI before trial, and conversations with Petitioner's wife. There

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(Transcript, at 1015-16).

> As for mitigation, the prosecutor testified that his interpretation of the psychological testimony was that during the previous killing, the Petitioner "got angry and snapped." (Transcript, at 1016). There was no evidence, according to the prosecutor, that there were any external circumstances operating on the Petitioner during the 1986 crime. (*Id.*)

is no reason that Dr. Masri's testimony should have been the key element prompting Petitioner's counsel to take action.

Similarly, admission of this testimony as an item of evidence during the guilt phase of the trial would not have affected the result. Had Petitioner's defense counsel hired an expert to opine that Petitioner was insane at the time of the stabbings in 1986, Dr. Masri's testimony about an incident in 1972 could have supported that opinion, but it certainly would not have been vital. Absent an insanity defense, there would be no reason to admit this evidence relating to a prior crime during the guilt phase of the trial.

As for the sentencing phase, Dr. Masri's testimony would have served as an item of mitigation relating both to the prior murder conviction, and to his mental history. But that testimony is only one item of evidence that, as the Court explains below, should have been introduced by trial counsel during the sentencing hearing as mitigation evidence. Standing alone, the Court is not persuaded that the absence of Dr. Masri's testimony undermines confidence in the outcome of the sentencing hearing.

As for the lab reports finding that no blood was found on clothing seized from Petitioner's apartment, there has been no evidence that the prosecutor kept this evidence from the defense. The prosecutor testified that he provided the lab reports to Petitioner's first trial counsel, Neal McAlpin, and Mr. McAlpin testified that he received them. (Transcript, at 223-25, 227, 925). Furthermore, the prosecutor testified that he filed the reports with the trial court as part of his response to the Petitioner's discovery request. (Transcript, at 911, 926; Supplemental Response Number Two To Defendant's Request For Discovery, Exhibit 19). Under these circumstances, the

Court concludes Petitioner's *Brady* claim regarding these lab reports is without merit.

Accordingly, the Court concludes that Petitioner's *Brady* claims are without merit, and are dismissed.

VII. Trial Counsel's Conflict of Interest

Petitioner claims that one of his trial attorneys, Lionel Barrett, had an irreconcilable conflict of interest in representing Petitioner because he was paid a $5,000 retainer by Southeastern Gospel Ministry ("SEGM") member Alan Boyd to represent the Petitioner, and was promised an additional $10,000 that was never paid (Amended Petition, at ¶ E1).[22] Sometime after his arrival in Nashville, Petitioner joined SEGM, a nascent religious group that had as its goal "cleaning up" the African-American community by eliminating illegal activities, primarily drug dealing. (Addendum 11, at 15-16). Petitioner's boss, Alan Boyd, co-defendant Miller, and William Beard were also members of the group. (*Id.*). Petitioner and co-defendant Miller both worked for Mr. Boyd at National Baptist Publishing.

Petitioner contends that Mr. Boyd had interests adverse to the Petitioner because Mr. Boyd and SEGM allegedly knew about and took part in the plan to visit the apartment of Patrick Daniels before the stabbings, and met with the Petitioner and co-defendant Miller after the stabbings. According to the Petitioner, Mr. Boyd retained Mr. Barrett and refused to pay him the full retainer with the effect of

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[22] $5,000 was inadequate to investigate and prepare this complex case for trial.

preventing Mr. Barrett from investigating the role of SEGM and Mr. Boyd in the crime.

In order to establish a Sixth Amendment violation, the Petitioner must show that an actual conflict of interest affected his lawyer's performance. *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 3120, 97 L. Ed. 2d 638 (1987); *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996).[23] Whether facts give rise to a conflict of interest is a mixed question of fact and law, which is to be reviewed *de novo*. *Mays*, 77 F.3d at 908.

In reviewing the denial of Petitioner's post-conviction petition, the Tennessee Court of Criminal Appeals found that Mr. Barrett did not know the funds he received came from SEGM member Alan Boyd. *Jones v. State*, 1995 Tenn. Crim. App. LEXIS 140, 1995 WL 75427, at *3 (Tenn. Crim. App. Feb. 23, 1995). Petitioner argues that this finding is not fairly supported by the record because Gail Hughes Mann, who delivered the money to Mr. Barrett, testified at the post-conviction hearing that she told Mr. Barrett that the money came from Mr. Boyd. (Addendum 11, at 13).

Both Mr. Barrett and Ms. Mann testified in a hearing before this Court. Mr. Barrett was quite certain he was not aware the funds came from Mr. Boyd. (Transcript, at 294, 410). Ms. Mann, on the other hand, was more tentative:

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[23] To the extent Petitioner argues that he is not required to show that the conflict "affected his lawyer's performance," this argument has been soundly rejected. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984); *Wilson v. Rogers*, 125 F.3d 856 (Table), 1997 WL 615767 (6th Cir. 1997).

Q. Did you tell him where the money came from?
A. I don't remember that. I don't know if I told him or not. I probably did. I don't know.
Q. In the post-conviction proceeding you testified you did tell Mr. Barrett?
A. Probably so.
Q. Can you testify to that today?
A. That I told him?
Q. Yes.
A. I don't remember. I don't know. I might have told him. If I say I told him back then, I did then tell him.

(Transcript, at 1281). In her subsequent testimony, Ms. Mann was a bit more definite that she had told Mr. Barrett the source of her funds, Mr. Boyd, would not be providing any more funds. (Transcript, at 1288).

Based on the testimony of Mr. Barrett and Ms. Mann, the Court concludes that Mr. Barrett was not aware that Mr. Boyd was the source of the fee, even if Ms. Mann happened to mention it in a conversation with him. Even if Mr. Barrett was aware of the source of the fee, the Court is not persuaded that it affected his representation.

Petitioner argues that the conflict of interest led Mr. Barrett to fail to request attorneys' fees and funds for expert support services. Petitioner also argues this conflict led Mr. Barrett to delay representation and to refuse to ask for a continuance.

In order to accept Petitioner's argument, the Court must find that the source of Mr. Barrett's fees had interests contrary to Petitioner's interest. But, as noted above, the Petitioner himself testified at sentencing that SEGM did not order him to commit the crimes for which he was convicted.

Moreover, even if Mr. Boyd's interests were adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing. Mr. Barrett elicited testimony about another SEGM member, William Beard, during cross-examination of Mr. Miller at the trial. (Addendum 1, at 1527, 1567). He also elicited testimony about SEGM from the Petitioner at the sentencing hearing, including testimony that Mr. Boyd supplied him with a shotgun, and William Beard supplied Mr. Miller with a pistol. (Addendum 1, at 1837-1848, 1855-1856).[24] Mr. Barrett also mentioned the Petitioner's connection with the group during his argument. (Addendum 1, at 1960). In addition, Mr. Barrett issued subpoenas for Mr. Boyd and Mr. Beard to appear at the trial. (Transcript, at 358).

During the evidentiary hearing in this Court, in response to a question by the Court, Mr. Barrett stated:

> Your Honor, I am as certain as a person can be from something that happened 10 years ago that I absolutely had no knowledge that these funds came from Mr. Boyd.

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[24] According to co-defendant Devalle Miller's testimony at the post-conviction proceeding, Alan Boyd met with Petitioner and Miller right after the murder of Patrick Daniels, and William Beard helped Miller leave town shortly thereafter. (Addendum 11 at 26-30). Mr. Boyd purchased the shotgun carried by Petitioner during the murder from a gun dealer in 1983, according to a firearms trace report. (Docket No. 200).

Alan Boyd and William Beard both asserted their Fifth Amendment privilege against self-incrimination at depositions taken in this case. Boyd and Beard effectively refused to answer any questions. (Petitioner's Exhibits 148, 149).

> For the sake of argument only -- even if I had been told these funds came from Allen Boyd, I would have had absolutely no hesitancy in going after him in any way I could and would think he had wasted his money if that is what he was attempting to do.
>
> I am absolutely certain that there was no decision, no single issue of strategy, not one question that Mr. Camp or I asked or did not ask had anything to do with the source of the funds that came from Ms. Hughes or from Allen Boyd.

(Transcript, at 410).

The Court is not persuaded that any alleged conflict of interest affected the performance of Mr. Barrett at trial or sentencing. Accordingly, Petitioner's conflict of interest claim is without merit, and is dismissed.

VIII. Ineffective Assistance of Counsel

A. Generally

Petitioner contends that trial counsel was ineffective during the guilt phase and during the sentencing phase of his trial (Amended Petition, at ¶ E2). In order to prevail on an ineffective assistance of counsel claim, the burden is on the Petitioner to show: (1) trial counsel's performance was deficient; and (2) actual prejudice resulted from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2064-68, 80 L. Ed. 2d 674 (1984); *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994).

In order to demonstrate that trial counsel's performance was deficient, a petitioner must show that counsel "made

errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 104 S. Ct. at 2064. The petitioner must show that trial counsel's performance, fell below an objective standard of reasonableness, measured by "prevailing professional norms." *Id.*

In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 104 S. Ct. at 2065. The petitioner must overcome the presumption that the challenged action by counsel was sound trial strategy. *Id.*

One of the duties of counsel is the duty to investigate his client's case. 104 S. Ct. at 2066. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

In order to show actual prejudice, a petitioner must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S. Ct. at 2068. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*

Thus, when a petitioner challenges his conviction on ineffective assistance of counsel grounds, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt about guilt. 104 S. Ct. at 2068-69. When the petitioner challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that "the balance of aggravating and mitigating circumstances did not warrant death." 104 S. Ct.

at 2069. In assessing prejudice, the court is to assume that "the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 104 S. Ct. at 2068.

The ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact, which is reviewed *de novo*. 104 S. Ct. at 2070; *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996).

Petitioner's contention that his trial counsel, Lionel Barrett and Sumter Camp, were ineffective was first raised on direct appeal by Petitioner's substitute counsel, Richard Dinkins. Petitioner argued that trial counsel should have presented evidence of Petitioner's mental incapacity at sentencing. (Addendum 2, at 57-59). In addressing this claim, the Tennessee Supreme Court stated: "There is no evidence in this record or any other part of [the Petitioner's] extensive criminal record to indicate he was either incompetent to stand trial or at the time this offense was committed. There is nothing in this record to indicate a remand for a determination of defendant's mental status would be appropriate." *State v. Jones*, 789 S.W.2d at 552.

Petitioner raised this issue again in his post-conviction petition. Petitioner based his contention that counsel was ineffective on over twenty separate grounds. (First Amended Petition For Post Conviction Relief, Addendum 11). At the post-conviction hearing, Petitioner's counsel called Petitioner's initial attorney, Neal McAlpin; trial counsel, Lionel Barrett and Sumter Camp; and appellate counsel, Richard Dinkins. (Addendum 11). Petitioner also called Gail Hughes Mann; Petitioner's co-defendant, Harold Devalle Miller; Petitioner's wife, Susi Bynum Jones; and a psychiatrist, Dr. Barry Nurcombe. (*Id.*)

The post-conviction trial court found that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental health history. (Memorandum and Order entered August 26, 1993, Addendum 11). Specifically, the post-conviction court found that trial counsel failed to investigate as follows:

> 1. Testimony and files of trial counsel showed that few witnesses were investigated or interviewed regarding petitioner's background and mental health history.
>
> 2. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's prior psychological consultation at ages 12 to 14 while at Ft. Shafter, Hawaii.
>
> 3. Testimony and files of trial counsel showed that they failed to investigate and obtain readily available information concerning petitioner's psychological assessment at age 14 by the school psychologist at DuPont Jr. High School at Ft. Lewis, Washington.
>
> 4. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's juvenile incarceration for being a psychopathic delinquent at Western State Hospital in Tacoma, Washington.
>
> 5. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning the petitioner's school records in Philadelphia, where on May 24, 1965 there was a request for psychological service by Sayre High School.

6. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's school records in Philadelphia, where on June 17 he was referred for Special Education.

7. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's incarceration at the Annadale Institute for Boys, New Jersey, when he was 15, his being placed on psychiatric watch in January of 1967 and his referral to and psychological examination at the New Jersey State [Psychiatric] hospital at Trenton in February of 1967.

8. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's Army records at ages 17 and 18 with notations regarding his "questionable mental status," bizarre behavior, and psychiatric reports leading ultimately to discharge.

9. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination at St. Elizabeth's Hospital, Washington, D.C., following his incarceration for assault on or about the day of his discharge from the Army, despite the fact that part of this information was sent to MTMHI per their request.

11. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination following petitioner's 1972 killing of a

> fellow prisoner while incarcerated for the assault referenced in paragraph 9 above.
>
> 12. Trial counsel has little knowledge of the facts related to the petitioner's 1972 murder conviction.
>
> 13. They failed to interview the psychiatrist and psychologist who conducted the MTMHI evaluation until after the trial began.

(Memorandum and Order entered August 26, 1993, at 5-6, Addendum 11) (footnote omitted) (emphasis in original).

The court concluded, however, that the failure to investigate did not prejudice the Petitioner because his background also contained harmful information. (*Id.*)

The Tennessee Court of Criminal Appeals agreed with the trial court's decision:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial.

Jones v. State, 1995 WL 75427, at *2.

During the evidentiary hearing in this Court, Petitioner called all the witnesses who testified at the post-conviction proceeding except Dr. Nurcombe and Mr. Miller. In addition, Petitioner presented, for the first time, the live testimony of Petitioner's half-sister, Nancy Lancaster; Petitioner's former fiance, Sarah Roberts Walton; co-defendant Miller's former attorney, Ross Alderman; mental health experts, Dr. Sadoff, and Dr. Nancy McCoy; Dr. Ray Winbush; and legal expert Brian Stephenson. Petitioner also presented, for the first time, the testimony of Detective Mark Garafola, Elmer H. Bishop, William Delagrange, and Richard Bretzlauf by deposition. (Petitioner's Exhibits 110, 135, 136, 152).

During their testimony before this Court, Mr. Barrett and Mr. Camp admitted most of the deficiencies alleged by the Petitioner. Mr. Barrett was first requested to represent the Petitioner in October, 1996. (Transcript, at 326). During the next month, Petitioner's initial counsel, Neal McAlpin, began to withdraw from representation. (Transcript, at 233-234). Mr. Barrett did not begin actually working on the case, however, until March, 1987. (Transcript, at 336-337). On April 20, 1987, Mr. Barrett first requested the help of Mr. Camp, who was an associate with Mr. Barrett's firm at that time. (Transcript, at 271-272, 342, 691). Mr. Camp first began work on the file sometime after May 11, 1987. (Transcript, at 691-692). Mr. Barrett took the lead in the case, and Mr. Camp's role was to assist him. (Transcript, at 695, 723). Trial was set for July 6, 1987. (Transcript, at 338).

Trial counsel had three to four months to prepare for trial. The investigation they conducted during this time was wholly inadequate. Mr. Barrett admits that he did not obtain Mr. McAlpin's file in the case, or discuss the case in any kind of depth with Mr. McAlpin, even though Mr. McAlpin suggested that he do so. (Transcript, at 240-242, 277, 279,

722). Because of that failure, and the subsequent failure to inspect the court file, Petitioner's trial counsel were not aware of the lab reports indicating that no blood was found on clothes seized from Petitioner's apartment. (Transcript, at 277, 292, 322, 341, 331-333). Counsel also failed to respond to a request, sent to Mr. McAlpin, from MTMHI staff for background information to be used in their psychiatric evaluation of the Petitioner. (Transcript, at 242-243, 331-333).

Mr. Barrett failed to request Petitioner's extensive mental health records, or his educational, prison, or military records. (Transcript, at 280-281). This was a serious failure.

Although Mr. Barrett prepared a motion requesting that the trial court declare his client indigent, and approve funds for investigative and expert services, he did not file the motion. This was a significant error. (Transcript, at 278, 363-367, 701).[25] Mr. Barrett did not consult or hire a mental health expert to perform an independent mental evaluation of his client. (Transcript, at 278, 718-719). This was a grave omission.

Mr. Barrett did not introduce any information from the MTMHI records relating to Petitioner's background or mental history at the trial or at sentencing. (Transcript, 725). Trial counsel received the MTMHI records only a couple of weeks prior to the trial, and neither recall speaking with any of the MTMHI staff about their report. (Transcript, at 280, 282, 352, 716-717). These were substantial errors.

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[25] The Motion was prepared three days after jury selection began. (Transcript, at 727). A post-trial motion for indigent status was approved. (Transcript, at 376; Petitioner's Exhibit 88).

Petitioner's attorneys did not call anyone in Petitioner's family to testify during the sentencing hearing. Mr. Barrett testified that someone in his office contacted Petitioner's brother, Mark Jones, before trial, but he refused to assist in Petitioner's defense. (Transcript, at 286-289). Mr. Camp testified that he did not contact the Petitioner's brother. (Transcript, at 710). At the post-conviction hearing, Petitioner introduced an affidavit from Mark Jones[26] indicating that he had not been contacted by Mr. Barrett's office. (Petitioner's Exhibit 74; ¶C Exhibit 67). It is undisputed that Petitioner's attorneys did not contact Petitioner's half-sister, Nancy Lancaster, even though she would have been available and willing to testify at the time of trial. (Transcript, at 832). Mr. Barrett did not contact Petitioner's former fiance, Sarah Roberts Walton, even though the Petitioner told Mr. Barrett about her. (Transcript, at 356). These were significant mistakes.

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[26] Mark Jones committed suicide on July 13, 1996. (Transcript, at 793).

Finally, Mr. Barrett failed to investigate the nature of Petitioner's prior convictions.[27] (Transcript, at 281, 708-709, 714-715). This was a substantial error.

As the trial date approached, Mr. Camp suggested that they request a continuance to conduct further investigation, but Mr. Barrett did not act on that suggestion. (Transcript, at 279, 705). This was a serious deficiency.

Although both these attorneys have good reputations in the bar, their performance in this case was clearly inadequate. Mr. Barrett critiqued his own performance as follows:

> I think as the trial progressed and on looking back on it now, I think that I should have sought out further psychiatric evaluation. I think it became evident during the course of the trial that Mr. Jones -- and in Mr. Camp's opinion and my opinion had some psychiatric or psychological issues we may not have fully realized early on in the case. . . Based upon the documents that I have now seen subsequent to the trial, I feel that my performance certainly did not

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[27] Mr. Barrett testified that the prosecutor introduced him to FBI Agent William Delagrange at trial, and that the agent said he would testify that Petitioner's 1972 conviction was the result of a "drug turf war," and not a homosexually-related killing, as Petitioner contended. (Transcript, at 294-299). Given his failure to investigate Petitioner's prior convictions, Mr. Barrett did not have any independent information about the conviction, and therefore, did not introduce mitigating evidence about this conviction at the sentencing hearing. (Transcript, at 299). As discussed herein, the 1972 conviction was not over drugs and gangs as represented by the prosecution to defense counsel. The murder concerned homosexual conduct that the jury could have found more mitigating.

> satisfy the standards that I adhere to myself as far as pursuing the psychiatric aspect, particularly at the sentencing hearing.

(Transcript, at 394-395).[28]

Mr. Camp's assessment was even more negative. He testified that he agreed with the state courts that his representation was deficient:

> We did not present the information to this jury so that they would know James Jones, so that in deciding whether he was to live or die they would know this man, they would know this human being. That was our failure.
>
> * * *

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[28] Shortly after the trial, defense counsel realized the need to fully consider Petitioner's mental state. Mr. Barrett wrote Mr. Camp the following memorandum on August 26, 1987:

> You will get a copy of communication from James Lee Jones saying that he thinks he is going to get the Nobel Peace Prize. I think he is probably crazy. I think that we should move to have him psychatrically evaluated prior to the sentencing hearing in view of the United States Supreme Court decision that you cannot execute a person that is crazy. I also think that in the sentencing provision in the code there is some indication that a person can be psychiatrically [sic] evaluated. We need to get this done as soon as possible and I would appreciate it if you could prepare the paperwork.

(Petitioner's Exhibit 85).

> ... We didn't give the jury any reason to oppose death on James Jones. We didn't explain to them how James Jones came to be in that courtroom facing them.

(Transcript, at 734, 741, 766).

Thus, this Court, like the state post-conviction trial court and appeals court, finds that trial counsel's performance during the guilt phase and during sentencing was deficient. Unlike those courts, however, this Court concludes that Petitioner suffered prejudice as a result of that deficiency during the sentencing phase of this trial.

Before addressing prejudice at sentencing, the Court will consider whether trial counsel's deficiencies prejudiced Petitioner as to the guilt phase of the trial. Petitioner argues he was prejudiced because trial counsel did not introduce the lab report indicating that no blood was found on clothes seized from Petitioner's apartment, and because trial counsel failed to obtain an expert to support an insanity defense.

The Court is not persuaded that if trial counsel had presented the lab report to the jury, they would have had a reasonable doubt about guilt. As discussed above, there is no evidence that Petitioner was wearing the clothes seized from his apartment during the stabbings.[29]

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[29] Petitioner also ignores the fact that he admitted his guilt at sentencing. (Addendum I, at 1865, lines 5-12; 1866, line 25 through 1867, line 6; 1893, lines 4-8; 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

Similarly, the Court is not persuaded that trial counsel's presentation of a mental health expert to testify on behalf of the Petitioner would have left the jury with a reasonable doubt about Petitioner's guilt. It is not clear that trial counsel would have found an expert to testify that Petitioner was insane at the time of the stabbings. As noted above, Dr. Sadoff's opinion that Petitioner was insane at the time of the offense comes some twelve years after the crime. Furthermore, any testimony to this effect would have been countered by the prosecution with MTMHI's opinion that there was no basis for Petitioner to invoke an insanity defense. Thus, the Court concludes that Petitioner suffered no prejudice at the guilt stage as a result of trial counsels' deficiencies.

As for sentencing, however, the Court concludes that there is more than a reasonable probability that, had trial counsel introduced the mitigation evidence they would have had available after a reasonable investigation, the result of the sentencing would have been different. The Court is of the opinion that the complete lack of mitigation evidence at sentencing undermines confidence in the outcome of the sentencing.

In evaluating the prejudice at sentencing, it is important to keep in mind the nature of mitigation evidence during the sentencing proceeding. In the "eligibility" phase of the sentencing proceeding, the jury narrows the class of defendants "eligible" for the death penalty, generally by determining whether certain well-defined aggravating circumstances are applicable to the case. *Buchanan v. Angelone*, 522 U.S. 269, 118 S. Ct. 757, 761, 139 L. Ed. 2d 702 (1998); *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 1764-65, 64 L. Ed. 2d 398 (1980). During the "selection" phase, the jury determines whether to impose the death penalty on a particular defendant. *Buchanan*, 118 S.

Ct. at 761. In regard to making this "selection" decision, the Supreme Court has "emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination." *Id.* Indeed, the Court has consistently held that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Id.*

Mitigating evidence relevant to the selection decision includes "'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 2946, 106 L. Ed. 2d 256 (1989). As the Supreme Court has explained: "If a sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" 109 S. Ct. at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 841, 93 L. Ed. 2d 934 (1987)). The sentencing decision should reflect "a reasoned moral response to the defendant's background, character, and crime." *Id.*

Thus, there is a broad array of evidence that is considered to be relevant to mitigation. In addition, the rules of evidence do not apply to the presentation of that evidence. During the relevant time period, Tennessee Code Annotated Section 39-2-203 (c) provided:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be

> limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(Exhibit 155).[30] Consequently, Petitioner's counsel were not constrained by evidentiary restrictions in introducing mitigation evidence at sentencing.

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[30] Thus, this Court has used a similar standard in determining whether prejudice has been established in light of the evidence that could have been admitted at the sentencing hearing. In that regard, the Court notes that Rule 7 of the Rules Governing Section 2254 Cases provides that the habeas corpus record may be expanded "by the inclusion of additional materials relevant to the determination of the merits of the petition." Habeas Corpus Rule 7(a). The Rule indicates that copies of letters, documents, exhibits, and affidavits may be included in the expanded record. Habeas Corpus Rule 7(b). The court "may require" the authentication of material added to the record under the Rule. Habeas Corpus Rule 7(d). Thus, Rule 7 contemplates a relaxed application of the hearsay, best evidence, authentication, and other evidentiary rules under the Federal Rules of Evidence. Liebman, Federal Habeas Corpus Practice and Procedure, § 19.5, at 532 (2d ed. 1994).

In this case, there was an abundance of mitigation evidence available that was never used at trial. For example, trial counsels' reasonable investigation would have produced information about Petitioner's childhood abuse by his father, a military policeman. Trial counsel could have introduced evidence about this abuse through descriptions contained in some of Petitioner's mental health records, through the testimony of Petitioner's step-sister, Petitioner's wife, Petitioner's now-deceased brother, and Petitioner's former fiance.[31]

During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. (Transcript, at 786, 818, 822-823, 832, 838-839). Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.

Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. (Transcript, at 786-787). Petitioner's mother put her three children in a taxi, drove

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[31] The affidavit of Mark Jones, Petitioner's deceased brother, which was introduced at the post-conviction hearing, confirms Petitioner's statements about the abuse and other difficulties he encountered during his childhood. (Mark Jones Affidavit, ¶ 5, Petitioner's Exhibit 74). Sarah Roberts Walton and Susi Bynum testified in this Court about Petitioner's previous statements to them that he had suffered abuse as a child. (Transcript, at 1191-1192; February 19, 1987 -- MTMHI Social History, Petitioner's Collective Exhibit 150).

them to the woods, and left them. (Transcript at 787).[32] Petitioner's mother later married Petitioner's father, James Jones, Sr. (Transcript, at 793-794). Three more children were born of that marriage -- James (Petitioner), Mark, and Sylvia.

Petitioner's statements to mental health providers provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. (Transcript, at 629-634; Petitioner's Collective Exhibit 150; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9). Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. (Transcript, at 475, 631, 818; Petitioner's Collective Exhibit 150). Petitioner's father struck Petitioner's penis with a baseball bat. (Transcript, at 475, 632). To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. (Transcript, at 634). None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury. This was a grave omission by defense counsel.

This, of course, is not to suggest that people who are abused as children should get away with murder. People with bad childhoods can be sentenced to death. But, the Constitution requires that these significant facts should have been presented to the jury at sentencing by counsel.

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[32] As a result, Ms. Lancaster was unable to testify as to her age or birthday. (Transcript at 787). The taxi driver went back to the woods, retrieved the children, and turned them over to the state. *Id.*

Petitioner's school and mental health records indicate that Petitioner's family lived in several different locations, and that Petitioner had undergone mental evaluations several times during his childhood. Petitioner ran away from home several times, and eventually, at 15, left home for good. (Mark Jones Affidavit at ¶ 4, Petitioner's Collective Exhibit 74; Transcript, at 630).

A reasonable investigation would have produced information about Petitioner's mental history. A review of the MTMHI records, which trial counsel had in their possession before trial, would have indicated that Petitioner had had prior mental evaluations, that he had served in the army, and had spent several years in prison. (Petitioner's Collective Exhibit 150). Petitioner's school, military and prison records reveal that Petitioner had been diagnosed in 1964 as having "paranoid personality" (December 11, 1964 -- Western State Hospital, Tacoma, Washington, Respondent's Collective Exhibit 8) and, in 1971, as having a "passive aggressive personality, aggressive type." (May 11, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142). These records also describe the Petitioner as: "very sick" and in need of immediate commitment (November 12, 1964 -- Richard Stiles of Dupont Junior High School, Respondent's Collective Exhibit 8), "in serious need of therapy" (May 24, 1965 -- Sayre Junior High School Staff, Respondent's Collective Exhibit 7); and "highly disturbed." (December 30, 1970 -- FR, Petersburg, Petitioner's Collective Exhibit 142; Respondent's Collective Exhibit 6, Tab 8). The records also reflect numerous suicide attempts (February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9; April 15, 1969 -- Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; March 19, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142; June, 1972 -- FCI, Tallahassee, Addendum 11, PC Exhibit). None of this

evidence was offered to the jury. This was significant error by counsel.

Petitioner also had a family history of serious mental conditions. Petitioner's sister, Sylvia, attempted suicide on multiple occasions and was institutionalized several times for mental health problems. (Transcript at 803, 815, 626). Petitioner's brother, Mark, committed suicide while this case was pending in this Court.[33] To call the Jones family dysfunctional would be an understatement. (Transcript at 626).

Had counsel conducted an in-depth interview before calling Susi Bynum to testify at sentencing, they would have gathered more evidence regarding Petitioner's mental health. They would have learned about Petitioner's belief that he and his wife would have the next Messiah; Petitioner's having carried on conversations with nonexistent people and animals; and his having banged his head against the wall on various occasions. (Transcript, at 1224, 1225, 1229, 1216).[34] Again, none of this evidence was made known to the jury. Ms. Bynum testified that she even told Mr. Barrett that he should have a psychiatrist examine the Petitioner before the trial.

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[33] Sylvia Jones, as a teenager, had a child out of wedlock by her own father according to Ms. Lancaster's uncorroborated view of the family's history. (Transcript at 793-795). The whereabouts of Sylvia Jones is unknown. Mark Jones committed suicide on July 13, 1996. (Transcript at 793). The suicide was within days of his arrest for sexually and physically abusing his children. (Transcript at 627).

[34] The Court notes that the MTMHI files also revealed much of this same information. (Petitioner's Collective Exhibit 150).

(Transcript, at 1250). These were serious deficiencies by defense counsel.

Had trial counsel heeded Ms. Bynum's suggestion and hired a mental health professional to evaluate the Petitioner, or had they interviewed MTMHI's Dr. Craddock, they could have presented evidence that Petitioner had, at the very least, exhibited symptoms of a Borderline Personality Disorder, including extreme emotional swings, identity disturbance, and self-mutilating behavior. (Transcript, at 129-132; 140). A mental health professional, like Dr. McCoy, could have offered testimony about Petitioner's background and mental history, and could have offered an explanation placing in context the negative aspects of Petitioner's past. (Transcript, at 613-663). By describing Petitioner's history of earnestly seeking a religious faith with which to align himself, Dr. McCoy's testimony would have supported the notion that Petitioner had been strongly influenced by the SEGM. None of this was put into evidence before the jury. The failure of counsel to do so was a serious error.

Trial counsel could have presented testimony showing that, despite his mental health problems, Petitioner had functioned as a productive member of society during the year before he came to Tennessee. If they had heeded Petitioner's suggestion that they talk with Sarah Roberts Walton, Petitioner's former fiance, they could have learned that after Petitioner was released from prison in Chicago, in 1983, he was hard-working and giving. Ms. Walton, now an attorney for the State of Maine,[35] testified that when she knew the Petitioner in 1983, he held a steady job, attended college, and

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[35] Ms. Walton has represented the State of Maine on two murder appeals. (Transcript at 1182).

performed volunteer work with a Quaker youth group at Cabrini Green, a large, infamous public housing development in Chicago known for its poverty and violence. (Transcript, at 1181, 1195-1196, 1197, 1205; Bretzlauf deposition, at 14-15, 17).[36] Ms. Walton described the Petitioner as gentle, caring, and filled with dignity; a person with whom she shared a sincere Christian belief. (Transcript, at 1204-1205). The jury heard nothing of the sort from any witness. This was a very significant failure by defense counsel.

The Court finds the testimony of Ms. Walton to be extremely credible. The content of her testimony, as well as her demeanor, made her a compelling mitigation witness on behalf of Petitioner for purposes of sentencing. Ms. Walton's testimony, based on personal knowledge, added a humanizing dimension to the file history and character of the Petitioner, good and bad, that was absent from any prior proceeding in state court, and yet could have been presented to the jury, had trial counsel conducted a reasonable investigation.

Had defense counsel learned more about the 1972 murder conviction, they could have presented evidence to the jury that the killing occurred when Petitioner approached the victim, Michael Stein, in his cell to confront him about spreading rumors that Petitioner had engaged in homosexual conduct, and that Petitioenr stabbed Stein during that confrontation. (Bishop Deposition, at 22-23, 24-25, 26, Petitioner's Exhibit 135; Delagrange Deposition, at 18-19, Petitioner's Exhibit

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[36] Ms. Walton ultimately broke off the engagement because she was concerned that Petitioner had psychological problems. (Transcript, at 1189-1190). Petitioner subsequently moved to Tennessee the year before the stabbings to be close to his brother, Mark Jones, who was stationed at Fort Cambell. (Transcript, at 1195).

136; Petitioner's statement dated April 2, 1972, attached as Exhibit to Delagrange Deposition, Petioner's Exhibit 136; Letter dated April 15, 1987 from David G. Lowe to John Zimmerman, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136; Memo dated April 7, 1972 from H.R. Hogan to Norman A. Carlson, attached at Exhibit to Delagrange Deposition, Petiioner's Exhibit 136).[37] The prison murder was not about drugs and gangs as represented by the prosecution to defense counsel.

More importantly, Dr. Masri testified at the 1972 murder trial that Petitioner had a "homosexual panic" and lost control when he killed Stein. (Petitioner's Exhibit 131, at 48). As noted above, Dr. Masri also diagnosed the Petitioner as having a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). Although this information does not provide a justification for the murder, it does provide the jury with some information upon which to evaluate it. Without some information tending to mitigate this prior murder, there was nothing to alter the likely mindset of the jury that because Petitioner had killed someone before, he

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[37] In response to a claim made by Mrs. Stein after her son's death, representatives of the federal institution where he had been incarcerated took the position that:

> Mr. Stein was a member of a group of inmates who were attempting to apply extortionate pressures on Jones to submit to Stein's demands for homosexual activities. The assault itself on April 1 arose out of an attempted assault on Jones approximately two weeks earlier by members of this group.

(Petitioner's Collective Exhibit 142; Bishop Deposition, at 25, Exhibit 135).

was not deserving of any leniency. The jury heard none of this evidence. Again, defense counsel made a substantial mistake.

Instead, at the sentencing hearing, the jury heard only two witnesses for the defense, the Petitioner and his wife. The defense was breathtakingly brief in content, and lacking in quality, and quantity. (Addendum 1, at 1836-1930). Petitioner's testimony on direct was essentially limited to his relationship with SEGM, his account of the events surrounding the stabbings, and a plea for his life. (Addendum 1, at 1836-1870). During cross-examination, the Petitioner initially lost his composure, and was not particularly articulate in answering the prosecutor's questions. (Addendum 1, at 1870-1905). Mr. Camp described the Petitioner's performance as "one of the saddest things I have seen in my legal career." (Transcript, at 731).[38]

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[38] Mr. Camp described trial counsels' deficiencies regarding Petitioner's testimony:

> It is my opinion that Mr. Joens was not prepared to go on the stand, that because of what I perceived to be his mental health problems that it would be hard for him to have been successful on the stand because we had not provided the factual foundation that the jury needed to be able to hear this man in context, that all they got was literally this man begging for his life.
>
> And it was more than he could handle and that he just broke down.

(Transcript, at 731).

The only line of questioning put to Petitioner's wife, Susi Bynum Jones, related to whether she had written some bad checks before Petitioner was incarcerated. (Addendum 1, at 1919-1929).[39] Counsel did not even attempt to elicit testimony from Mrs. Jones that she loved her husband, found good in him, or hoped he would not be executed.[40]

The jury in this case heard no witnesses who expressed a concern whether Petitioner lived or died, even though such witnesses were available and known to defense counsel. This was a grievous flaw.

As Respondent argues, and the state courts found, that was also a considerable amount of negative evidence that the prosecution could have introduced during the sentencing hearing. That evidence includes a criminal record which indicates that Petitioner was convicted of assault at the age of 15, and two more assaults at the age of 19. (Petitioner's Exhibit 105; Petitioner's Exhibit 146; Respondent's Collective Exhibit 9; Respondent's Collective Exhibit 10). As noted above Petitioner was convicted for the second degree murder of Michael Stein at the age of 21. (Petitioner's Exhibit 105).

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[39] Even though he conducted the direct examination of the Petitioner's wife, the only mitigation witness offered besides the Petitioner, Mr. Camp did not conduct an interview with her prior to trial. (Transcript, at 724; 1248, 1250).

[40] Ms. Jones spoke effervescently about her husband at the hearing in this case. "Well, when I first met James, he opened up his mouth, it was like thunder from heaven ... I was fascinated with James ... he was different, just different from any man I had ever met ... he wanted to do something for the world. I was intrigued by that." (Transcript, at 1216).

Petitioner has been diagnosed as having a sociopathic personality disturbance with anti-social reaction and mild depression, (March 10, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9), as having an anti-social personality (November 7, 1968 -- Fort Meade, Maryland, Respondent's Collective Exhibit 10; June, 1977 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 59), and as having a psychopathic personality. (January 13, 1978 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 67).

Petitioner has also been diagnosed as having no mental illness. (April 15, 1969 -- Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; December 31, 1969 -- St. Elizabeth's Hospital, Respondent's Collective Exhibit 11; April, 1970 -- Dr. Angus, Respondent's Collective Exhibit 6, Tab 101; Dr. Eardley testimony at Stein murder trial, Petitioner's Exhibit 131, at 57-58, 59, 66).

The prosecution could have introduced evidence that during his many years in prisons, Petitioner was involved in numerous citations for misconduct, including possession of a knife. (Respondent's Collelctive Exhibit 6). Prison records would also show that Petitioner escaped shortly before his parole date in 1982, but was recaptured a few months later. (Respondent's Collective Exhibit 6, Tab 94). While on escape, Petitioner was a witness in a murder case.

Petitioner's army records indicate that during his service in the army, Petitioner was absent without leave on more than one occasion, and ultimately, was discharged under conditions other than honorable. (Respondent's Collective Exhibit 10).

Finally, Petitioner's school records indicate that he was suspended from school for threatening a teacher with a knife. (May 24, 1965 -- Sayre Junior High School, April 25, 1966 -- Shaw Junior High School, Respondent's Collective Exhibit 7; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9).

Notwithstanding this negative evidence, however, the Court is persuaded that had counsel presented the other evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty. It only takes one juror to decide that the mitigation evidence presented by the Petitioner outweighs the aggravating circumstances established by the prosecution. (Tenn. Code Ann. § 39-2-203; Exhibit 155). No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in favor of the death penalty.

This is not a case where counsel collected and put on the significant mitigating evidence and merely failed to get everything. This is a case of no mitigating evidence -- none -- being offered to the jury despite its availability and abundance. Defense counsel was substantially ineffective and Petitioner was thereby deprived of a constitutionally fair trial.

Petitioner stated it succinctly to the jury at sentencing:

> I don't know you. You don't know me. So, it ain't no feeling there what you should do to me.

(Addendum I, at 1869, lines 15-16).

According to the prosecutor's assessment after trial, given the paucity of evidence that was presented by Petitioner's attorneys, the jury had little reason to hesitate in imposing the death penalty: "The jurors all expressed to us their satisfaction with their verdict and were quite surprised at their own ability to impose the death penalty on this particular man with no reluctance whatsoever." (Letter dated July 17, 1987 from John Zimmerman to David G. Lowe; Petitioner's Collective Exhibit 136).

The Court acknowledge that Lionel Barrett and Sumter Camp have good reputations in the Nashville bar for being fine criminal defense lawyers. This case illustrates that lawyers do not make cases based on their reputations. A lawyer must actually work on each case. Cases are made through factual investigation, research, writing, witness preparation, trial strategy, and a bit of good fortune. In this case, the hard work required was simply not done. This Court agrees with the state post-conviction trial and appellate courts that Mr. Barrett and Mr. Camp provided inadequate representation. Good lawyers can and do fail. Here, Mr. Barrett and Mr. Camp utterly failed in their duty to adequately represent their client, who, as a result of this miscarriage of justice, was unconstitutionally sentenced to death.[41] This is not a case of harmless error.

This conclusion is not one the Court reaches casually. The Court mindful of the importance of the sovereignty of the State of Tennessee and the need to respect the certainty and finality of court judgments. This Court has no interest in

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[41] Mr. Barrett as lead counsel, and Mr. Camp as assistant counsel, each had an independent duty to provide effective assistance of counsel.

simply second-guessing the decisions of the state courts. But the overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the jury or the state courts,[42] and the almost complete failure to present a defense at Petitioner's sentencing hearing, compels the Court's conclusion that Petitioner's death sentence cannot stand. The Constitution of the United States, and this Court's duty to uphold its principles, mandate the issuance of the writ of habeas corpus as to Petitioner's death sentence.

IX. Conclusion

All Petitioner's claims are procedurally defaulted except Petitioner's Brady claims, trial counsel conflict of interest claim, the ineffective assistance of counsel claim, and those claims already addressed by the Court in previous orders. The Court concludes that Petitioner's Brady claims, and conflict of interest claims, are without merit, and they are dismissed.

With respect to Petitioner's ineffective assistance of counsel claim, the Court concludes that Petitioner received ineffective assistance of counsel during the sentencing phase of his trial, and therefore, Petitioner's petition for a writ of habeas corpus relief is granted as to that claim. Accordingly, the Court vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. As noted above, Petitioner is also serving two consecutive life terms for assault with intent

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[42] For example, Nancy Lancaster, Sarah Roberts Walton, Robert Sadoff, Diana McCoy, Kris Sperry, Raymond Winbush and Brian Stephenson were not called as witnesses in the state post-conviction proceeding.

to commit murder and armed robbery and shall remain incarcerated.

It is so ORDERED.

/s/_____
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE